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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1-375~~ 1147

K-91, INC.,
Petitioner,

v.

GERSHWIN PUBLISHING CORPORATION;
REMICK MUSIC CORPORATION,
BROADWAY MUSIC CORPORATION,
and BUXTON HILL MUSIC CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

K-91, INC., *Petitioner,*

v.

GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION, and BUXTON HILL MUSIC CORPORATION, *Respondents.*

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on January 13, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R.35[1]), is printed in Appendix "B" hereto, *infra*, p. A-4. The opinion of the Court of Appeals, printed in Appendix "C" hereto, *infra*, p. A-13, is reported in..... F.2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1967 (R. p. 303). A petition for rehearing was

1. "R." refers to documents in the record as listed in petitioner's designation of the record to the district court and respondents' counter designation. "Tr." refers to pages in the trial transcript. "P.Ex." refers to plaintiff's (respondents') exhibits. "D.Ex." refers to defendant's (petitioner's) exhibits. "App." refers to the appendix to this petition.

filed on February 8, 1967 and denied on February 16, 1967 (R. p. 304). The jurisdiction of the court is invoked under 28 U.S.C., Sec. ~~1945~~ 1254(1).

QUESTIONS PRESENTED

1. Is a combination of over 8000 music copyright owners who have pooled over one million copyrights and who offer to license only their entire package and only at a fee based upon a percentage of the licensee's gross income, automatically immunized from illegal block booking and price fixing merely because the individual copyright owners retain the right to license individual copyrights and because a federal court may determine if the license fee demanded is reasonable. Further, is the collective licensing immunized where negotiations by prospective licensees with individual copyright owners for separate copyrights is impossible and the only federal court which will determine the reasonableness of a quoted fee is located in New York out of reach of most prospective licensees.

2. Do the antitrust laws authorize the federal courts to fix the prices at which combinations of competing copyright owners can charge the public for their copyrights.

3. When a combination of copyright owners, acting to protect and further maintain its monopoly, presses upon users of its collective copyrights legal actions charging infringement of the copyrights accumulated to establish and further the monopoly, accompanied by a campaign of threats to intimidate and coerce the users into accepting its collective licenses, does the privilege of copyright absolve the combination from the consequences of damages under the Clayton Act?

4. Is a combination of owners who have combined their copyrights and are licensing them collectively in an entire package under one price arrangement given immunity from violation of the antitrust laws by the fact that prospective licensees can refuse to deal with them.

5. Does misuse of the copyright privilege bar a copyright owner from obtaining relief for copyright infringement.

6. Whether a consent decree by its terms can immunize against further violations of the antitrust laws.

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 101, 116 of the Copyright Law, 17 U.S.C. Sec. 1, 101, 116; Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sec. 1-2; and Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sec. 15, 26. The full text of the statutes will be found in Appendix "A."

STATEMENT

Introduction

The subject of this controversy is the method of marketing copyrighted music for performance on radio stations throughout the country. The case arose when scores of music copyright owners filed suit for infringement of their copyrights under 17 U.S.C. Secs. 1, 101, against eleven radio stations and a stockholder of one (R. 30, Fact 40). The copyright owners prayed for injunctions against further infringements, statutory damages, attorneys' fees and costs. Several of the suits were settled before trial. Three of the eleven stations sued elected to go to trial as "test

cases." The copyright owners prevailed and the district court entered judgment awarding damages and enjoining further infringement (App. "B"). Consequently, two stations and the stockholder settled (R. 49, Settlement Agreement). The petitioner, K-91, Inc., elected to appeal. The trial court had jurisdiction pursuant to 28 U.S.C. Sec. 1337 and 1338. The Court of Appeals had jurisdiction by virtue of U.S.C. 28, Sec. 1291.

In order to clearly present the issues, the stations admitted the infringements, but contended the copyright owners were misusing their copyrights in violation of public policy generally, and particularly in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sec. 1, 2. They contended no relief should be granted because the copyright owners had come into court with unclean hands. Specifically, the stations charged that the copyright owners had, between themselves and in conjunction with the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), fixed prices, engaged in block booking of copyrights and other unlawful practices in violation of the Sherman and Clayton Acts and the laws of the State of Washington, particularly R.C.W. 19.24. The stations also counterclaimed seeking treble damages and an injunction against further misuse of the copyrights. Fed. R. Civ. P. 13(a), 15 U.S.C. Secs. 15, 26.

Facts Establishing Combination, Monopoly and Discrimination

ASCAP is an unincorporated association located in New York acting as a licensing agency for its several thousand music copyright members (R. 30, Facts 10, 11). Besides its licensing functions, ASCAP polices for infringements.

(For background, see *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (1948) at 891). Each member assigns all its copyrighted musical compositions to ASCAP (R. 37, Fact 21, Def. Ex. A-4). The license fees collected are pooled and the proceeds divided (R. 37, Fact. 20, D. Ex. A-4). All performance rights owned by the members must be assigned to ASCAP for mutual licensing (R. 30, Fact 18, R. 37, Fact 21, D. Ex. A-4). Therefore, all the music copyrights sued for below are in the ASCAP license pool.

ASCAP is one of three music licensing organizations which together license substantially all of the copyrighted music works in the United States (R. 37, Fact 18). Today its membership is over 8,800 composers, authors and publishers (R. 37, Fact 16; R. 30, Fact 11). It controls more than a million music copyrights (R. 30, Fact 12, 13), and more than 50% of all copyrighted music broadcast is licensed by ASCAP (R. 37, Fact 18).[2]

In the 1940's, the Justice Department became concerned over ASCAP's activities and its overwhelming control of music licensing. The government sued, charging numerous infractions of the antitrust laws, including block booking and price fixing. This resulted in the 1941 consent decree. (The Amended Final Judgment of March 4, 1941, in the United States District Court for the South-

2. In 1962 (time of establishing stipulated facts), ASCAP collected almost 35 million dollars from license fees, over 30 million coming from 5,000 broadcasters (R. 30, Fact 49). More than 87% of ASCAP's total revenue is derived from the broadcasting industry and less than 13% from all other users combined (R. 30, Fact 48). In the State of Washington, the discrimination is worse. All collections are from broadcasters and ASCAP collects nothing from other music users (R. 30, Fact 21).

ern District of New York in Civil Case No. 13-95 (Def. Ex. A-1)). In 1948, two federal district courts held that notwithstanding the 1941 decree, ASCAP and its members were still violating the antitrust laws. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). As a consequence the 1941 decree was amended in 1950.

Significant to this petition, the 1950 consent decree provided the following:

1. The licensing rights acquired by ASCAP must be non-exclusive (D. Ex. A-2, §IV(B)).

2. ASCAP is required to issue to motion picture producers a single license covering copyrighted music on films without requiring further licenses by theaters showing the films (D. Ex. A-2, § V(C)).[3]

3. ASCAP is permitted to fix the license fees it will charge and the method of assessing the fees, but the United States District Court for the Southern District of New York is empowered to review the reasonableness of the proposed fee and set a different fee (D. Ex. A-2, § IX). Significantly however, the court has no power to determine the formula for assessment. (See, *In re Matter of the Application of Shenandoah Valley Broadcasting, Inc., et al.*, U.S. Dist. Ct. So. Dist. N.Y. Civil 13-95).

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3. Significantly, the decree does not require ASCAP to give the same kind of protection to television stations which show the same films. Also the decree does not require ASCAP to issue such single licenses to record producers without requiring further licenses by radio stations performing the music on the records (D.Ex. A-2, R. 37, Fact 73). Therefore, although radio and television stations compete with moving picture theatres in the entertainment industry, they are not freed by the decree or by ASCAP voluntarily from paying fees to ASCAP, but their competitors in the motion picture industry are.

Facts Establishing Block Booking

ASCAP insists that prospective licensees accept its entire package of over 1 million music copyrights and refuses to offer licenses of parts of its pool (R. 30, Facts 22, 23, 25, 82). High quality music, greatly desired, is licensed by ASCAP only on the condition that inferior and no longer popular music which comprises the vast bulk of its pool is also taken (R. 30, Facts, 81-84). Thus, broadcasters are forced to pay for music they do not want or need (R. 36, Tr. 171-73, 210-11). The 1950 consent decree does not prohibit this, but instead the decree requires that ASCAP's right to license be non-exclusive. Therefore, the individual members of ASCAP are free to make their own arrangements with prospective licensees. Unfortunately, this is an impossible alternative and worthless to prospective licensees and copyright owners alike because stations cannot contact over 8,800 copyright owners and negotiate thousands of individual licenses (R. 30, Fact 56, R. 37, Fact 25).

At the present time, broadcasters do not need nor can they possibly use all of ASCAP's one million musical selections (R. 36, Tr. 8, 9, 16-18, 81-83, R. 36, Tr. 173, 200, 201). Some stations only need western music, others religious, some rock and roll, and others classical (R. 30, Fact 81). In fact, most modern day radio stations specialize, and although they make many plays each year most are repeats. The petitioner also specializes and needs very little of ASCAP's repertory. More significantly, radio stations, including the petitioner, cannot survive without using some ASCAP music (R. 30, Facts 45, 48, R. 36, Tr. 5).

Facts Establishing Price Fixing

ASCAP offers broadcasters only two kinds of licenses called "Blanket" and "Per Program," but both require the licensee to take the entire ASCAP package and both require that fees be paid upon a flat percentage of gross revenues after certain deductions (R. 30, Fact 22, D.Ex. A-9). The blanket license fee is 2.125% of all gross revenues of the station. The per program license fee is 8% of the gross revenues derived from programs on which ASCAP music is played (R. 30, Fact 23, R. 37, Fact 45). Even though much station revenue is derived from programs such as news, sports and discussion containing no music at all, most stations cannot afford to take a per program license (Tr. 17, 140, 171-2, 211, 226-227, 305). Thus, there is no genuine economic choice between the two forms of licenses.[4]

The decision to charge the same price for all music, to calculate fees on gross revenue rather than per piece or by weighted charges such as by popularity ratings or record sales, the deductions that may or may not be taken, the terms for collection of payments, the terms for cancellation, and all details are determinable by ASCAP without court review (R. 30, Fact 24, D.Ex. A-9). The only matter subject to court review is whether or

4. The per program license is so impractical and onerous as to be no alternative at all. Of the over 5,000 stations licensed by ASCAP and broadcasting in the United States, fewer than 100 have elected to use the per program license and none are using it in Washington (R. 30, Facts 57, 62).

not the rate charged on grosses as selected by ASCAP—that is the 2.125 per cent or the 8 per cent—is reasonable or not.[5]

Facts Establishing Coercion and Other Abuses

The continued acquisition of a huge number of copyrights into a central licensing agency is perpetuated by the bringing of numerous infringement suits (R. 30, Fact 12; R. 37, Facts 18, 20, 21). In the past year and one-half, ASCAP's members brought 15 suits against eleven radio stations in Washington alleging 272 infringements (R. 37, Fact 63). ASCAP makes all decisions to sue and has complete control of all litigation pursuant to its plan to foster and exploit the advantage of its copyright acquisitions (R. 37, Facts 55-62). The potential liability to the 11 stations selected amounted to a staggering $1,360,000.

Most significant is the fact that all radio station licenses expired on the same date and just as they all expired "ASCAP *refused* to offer licenses to any broadcasters located in the State of Washington." (R. 30, Fact 73.) (Emphasis added.) Not only was petitioner refused a license, but even all those stations licensed and paying fees were refused renewals. (This refusal was also found by Judge Ryan in the New York district court (P. Ex. 12).) This meant that no radio or television station in Washington

5. Also significant is the uselessness of the very limited court review. Under the 1950 consent decree, a prospective licensee who is dissatisfied with the percentage rate charged is given the "opportunity" of petitioning a court located in New York City for a determination (D. Ex. A-2, § IX). Because of petitioner's location on the opposite coast, this "opportunity" is not realistic but an illusion. And because the consent decree requires all licensees to be charged the same rate, individual rate determinations are illusory. (D. Ex. A-2, § IV(C).)

could obtain a license from ASCAP for music in order to stay in business. ASCAP refused to issue any licenses and it was impossible for them to obtain licenses from ASCAP's members (R. 30, Fact 56, R. 37, Fact 25).

REASONS FOR GRANTING THE WRIT

The Decision Below Raises the Substantial and Novel Question of Whether the Antitrust Laws Authorize the Federal Courts To Fix Prices Among Competitors

The court below holds that over 8,800 music copyright holders may legally combine and pool over one million copyrights and license only their entire package. Further, that a federal court may fix the prices at which the combination charges for its copyrights (App. "C"). This means that for the first time, federal courts have the authority under the antitrust laws to fix prices among competitors and further, for the first time they may act as quasi-administrative agencies with power to inquire into the reasonableness of the activities of price fixing combinations and into the reasonableness of the rates charged. The antitrust laws contain no provisions which authorize rate making by federal courts. To the contrary, all decisions heretofore have been that price fixing is per se unlawful. (See citations *infra.*)

Through the device of a consent decree the Justice Department and ASCAP have thrust upon a federal court rate making powers and administrative responsibilities heretofore only possessed by administrative agencies. Without congressional authority the decree transforms a federal court into the role of a regulatory commission with the power to make rate determinations affecting nationwide industries. The decree makes a federal judge

the national czar of the music licensing industry. His functions are more executive and administrative than judicial and his judgment is supreme. In reality a Federal Music Licensing Commission has been created for broadcasters whether they like it or not and competition among copyright owners has been eliminated. (See, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), *United States v. ASCAP*, 341 F.2d 1003 (2d Cir. 1965); *United States v. ASCAP*, 331 F.2d 117 (2d Cir. 1964); *In the matter of the Shenandoah Valley Broadcasting, Inc., et al., United States v. ASCAP*, Civil Action No. 13095 (S.D.N.Y.).

The Decision Below Is in Direct Conflict with the Decisions of the Supreme Court That Price Fixing Is a Per Se Violation of the Antitrust Laws

1. Ever since *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), the Supreme Court has ruled that price fixing among competitors is illegal per se, and the "power to fix prices, whether reasonably exercised or not, involves power to control the market . . ." (*United States v. Trenton Potteries Co., supra*, 273 U.S. at 397). The fact that ASCAP's 1950 consent decree permits a federal court to review the reasonableness of the license fees charged and fix reasonable fees sets a precedent which is not authorized by Congress in the Sherman and Clayton Acts (15 U.S.C. Sections 1-7, 12-27). It also runs contrary to the Supreme Court doctrine that the "machinery employed by a combination for price fixing is immaterial." (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).) The concept that price fixing should be permitted by any device whether judicially

reviewable or not is contrary to the objectives Congress had in mind in enacting the antitrust laws. Price fixing arrangements, no matter how accomplished, are potential threats to free competition and necessarily involve power to control the market. Therefore, the courts have always held that arrangements which create such potential power are "themselves unreasonable and unlawful restraints without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." (*United States v. Trenton Potteries Co., supra,* 273 U.S. at 398.) The lower court's decision is in theory and practical effect opposed to these long established principles.

Ever since the *Trenton Potteries* decision, the courts have been consistent that under the Sherman Act "a combination formed for the purpose and with the effect of raising, depressing, pegging or stabilizing the price of a commodity . . . is illegal per se." (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223.) (See, Van Cise, Understanding the Antitrust Laws 24, 25 (1963) and cases cited therein.) The decision below means, however, that in matters involving music copyrights the rule that price fixing is per se illegal is no longer applicable and now in the future, courts will be permitted to inquire into the reasonableness of rates charged licensees. Stated otherwise, if this decision is allowed to stand, copyright owners will be excepted from the per se rule.

The court below rationalizes prices are not being fixed

because "ASCAP . . . is not the price fixing authority" and instead, the court fixes the prices (App. C). The substantive result that rates are fixed cannot be avoided merely by manipulation of words. The suppressing anti-competitive evil is still present whether a federal court is permitted to fix prices or otherwise competing copyright holders fix them. In either event, the end result is the same. Competition is removed and economic control fostered. In either event, the result is directly contrary to what Congress authorized in the Sherman Act. Moreover, the Supreme Court states that "in the absence of express legislation requiring it," and there is none, it would "hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable. . . ." (*United States v. Trenton Potteries Co., supra,* 273 U.S. at 398.) In spite of this, the court below adopts this uncertain test. It sanctions the right of the New York district court to determine reasonableness and thereby departs from the *Trenton Potteries* rule. It also disregards the holding in *United States v. Socony-Vacuum Oil Co.* that "the machinery employed by a combination for price fixing is immaterial." (*United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 223.)

2. Assuming for argument that the New York district court should be permitted to determine the complex and uncertain question of reasonableness of the fee quoted, ASCAP still fixes price facets over which the district court has no control whatsoever. The point is that the lower court did not recognize at what point prices became fixed.

Under the consent decree, ASCAP has control of the licensing of all the copyrights of its members without the burden of court supervision of other pricing conditions except the final rate it elects to charge. The decree merely requires that ASCAP's licenses be "blanket" or "per program" and that they be non-discriminatory. This has already been determined by two federal courts. Judge Ryan, the very judge who administers the ASCAP consent degree, held that Section IX of the decree "deals with the procedure for determining reasonable license fees, not types of licenses" and the decree does not "compel ASCAP to give any type of license [an applicant] demands and have the court fix the fee." (*In the Matter of the Application of Shenandoah Valley Broadcasting, Inc., et al., United States v. ASCAP,* Civil Action No. 13095 (SDNY) *aff'd* 331 F.2d 117.) "On the contrary, the decree gives ASCAP the initiative in proposing the entire formula, contemplates further negotiations if this appears unreasonable, and directs an application to the court in case of a stalemate." (*United States v. ASCAP,* 341 F.2d 1003, 1009 (1965).) Consequently, the act of price fixing is accomplished before the court administering the decree ever sees an ASCAP license. ASCAP determines the formula for licensing and the decree does not compel ASCAP to provide any other formula (D. Ex. A-2, Sections VIII, IX). Thus, the prices are fixed within the meaning of *Trenton Potteries* and the other price fixing cases cited when ASCAP makes the initial determination that it will license only an entire package and no lesser part, that it will accept charges based only on a percentage of gross revenues and that it will price all its one million copyrights at the same rate (R. 30 Facts

24, 81, 82, 83, 85, D. Ex. A-9, being ASCAP's licenses). This alone is price fixing and the fact that a court is permitted to fix only whether the end percentage rate charged should be 1 per cent or 10 per cent is immaterial.

> "Hence prices are fixed within the meaning of the *Trenton Potteries Co.* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices, they are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940).

3. The decision below also departs from another well established rule pertaining to illegal price fixing. Prices are fixed by the acts of purchasing "a part of a supply of a commodity for the purpose of keeping it from having a depressive effect on the market. . . ." (*United States v. Socony-Vacuum Oil Co., supra*, 310 U.S. at 224) The mere scheme of requiring all copyright owners to assign their supply of a million copyrights to it for mutual licensing is an act of price fixing regardless of the rate finally charged. *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944); *United States v. Masonite Corporation*, 316 U.S. 265 (1942).

If the lower court decision is allowed to stand, and courts are permitted to fix prices at which otherwise competing interests may charge the public, then competitors in other industries should also be able to combine and

have the benefit of a federal court fixing the prices at which they may charge their customers. Further, if the decision stands, henceforth questions of reasonableness are material to the issue of illegality. Further yet, if the decision stands, the per se rule is henceforth modified to the extent that music copyrights are excepted from its application, and that in the future the instance of illegal fixing takes place only at the point where charges are set. Acts which were formerly considered illegal price fixing such as pooling, joint licensing agreements, joint credit restrictions, etc. will be permissible so long as the end amount or rate charged is not fixed or if fixed, is subject to court review for reasonableness. These are the logical consequences of the decision if the lower court is correct in saying "ASCAP cannot be accused of fixing prices."

The Decision Below Is in Direct Conflict with the Decisions of the Supreme Court That Block Booking of Copyrights Is a Violation of the Antitrust Laws and Raises Substantial and Important Questions Concerning the Extent of the Antitrust Law's Prohibition Against "Tying" Agreements

1. This petition raises substantial and important questions concerning the extent of the antitrust law's prohibition against "tying" agreements and the relief necessary to eliminate such practices. The principle that block booking of copyrights is unlawful "grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against all infringements of his patent." (*United States v. Loew's, Inc.*, 371 U.S. 38, 45 and 46 (1962).) *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), condemned block booking of

copyrighted motion pictures into movie theatres. However, the court below held that pooling of over one million music copyrights and offering to license only the entire package is not unlawful block booking because "ASCAP's licensing authority is not exclusive," and the "right of the individual composer, author or publisher to make his own arrangements, are fully preserved." (App. "C"). The court plainly misapprehended the reach of *Paramount* because it ignored the trial court's finding and the stipulated fact that it is virtually impossible for prospective licensees to seek individual arrangements and virtually impossible for individual copyright owners to make their own arrangements with prospective licensees (R. 30, Fact 56, R. 37, Fact 25). The extent of the coercive power left in ASCAP's hands by this useless and illusory exception to *Paramount* is such that radio stations are still regularly required to deal with ASCAP and thereby are still induced and in fact required to take unneeded and unwanted music with needed and wanted music. Therefore "competition on the merits with respect to the tied product is inevitably curbed." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

In the landmark case of *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156, this court defined "block booking" as "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." Condemning this practice as violative of the antitrust laws, the court stressed the anticompetitive effects of any form of block booking (*Id.* at 158):

> "Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market value for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have * * * (T)he result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses."[6]

The court concluded that copyrighted films may be sold "in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film," but that the Sherman Act forbade any "refusal to license one or more copyrights unless another copyright is accepted" (*Id.* at 159). See also *International Salt Co. v. United States*, 332 U.S. 392; *United States v. Griffith*, 334 U.S. 100; *Standard Oil Co. of California v. United States*, 337 U.S. 293; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594.

In *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, the court again explained why "tying agreements fare harshly under the laws forbidding restraints of trade." The opinion pointed out that such arrangements inevitably curb competition in the tied product on its merits by forcing buyers to forego their free choice between

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6. Compare: "The performance rights to some music in ASCAP's repertory is vastly more valuable than the performance rights to other music in ASCAP's repertory, and of all the millions of musical compositions copyrighted very few become hits or of any significant value. This is also true of the performance rights to music written by the plaintiffs." (R. 30, Fact 83.) (See R. 36, Tr. 170-2, 210-11, 269, 303-5.)

competing products and by "deny[ing] competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market" (356 U.S. at 6). (See R. 36, Tr. 170-2, 210-11, 269, 303-5; R. 30, Facts 81-83.) Accordingly, tying arrangements are unreasonable "in and of themselves," "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (356 U.S. at 5).

Applying these principles ASCAP's outright refusal to license one or more music copyrights unless other unwanted music is also taken is clearly unlawful. However, the court below approved the refusal to license other than in a block because ASCAP's licensing authority is not exclusive. It is the petitioner's contention that there are neither realistic factual differences nor relevant legal distinctions between (a) an outright refusal to license except in a block and (b) a refusal to license except in a block so long as an impossible method of licensing individual music is available. The effect of creating an unrealistic distinction between these categories is to invite wide-spread avoidance of the Sherman Act's prohibition against block booking agreements.

The anticompetitive impact of block booking is precisely the same whether or not the copyright holder reserves the right to license his music individually if realistically the right is virtually impossible to use. In both instances the same economic pressures are brought to bear on the prospective licensee by the copyright holder in order to induce a license of unwanted music along with

wanted music. A station which wants only part of the offered ASCAP repertory is induced to buy the entire package by its affirmative need to obtain the desirable portions of the package and by the futility of dealing with individual copyright owners. The broadcaster is still faced with the all-or-nothing proposal.

2. There is little legitimate business justification for an outright refusal to sell less than an entire package of copyrights. All of the copyright owner's legitimate business objectives can be accomplished without requiring licenses of the entire ASCAP repertory. These could easily be accomplished by requiring ASCAP members to handle licensing of music to the broadcasting industry as it is now required to license music to the motion picture industry.

Under the 1950 consent decree ASCAP and its individual members are prohibited from splitting performance rights and recording rights of music on motion picture films. Instead the decree requires them to offer to motion picture producers licenses of the right to record music on films and licenses to perform the music when the film is run. Therefore, when the producer distributes the film, it carries with it the right to perform the music on it. The theater exhibitor is therefore free to run the film in his theater without obtaining a license from ASCAP or its members. The theater exhibitor pays for the right to run the music on the film in the price of the film. To insure that this simple and fair method of licensing will be accomplished, the consent decree not only requires that a single performance license be offered to the producer, but it prohibits ASCAP and its members

from suing theater owners for infringement (D. Ex. A-2 Sections IV (E) (F), V (C)).

The consent decree does not provide the same simple and efficient relief to broadcasters. Petitioner submits it should. If ASCAP and its members were required to license performance rights to recording companies along with recording rights, stations would pay for the right to play a record in the purchase price of the record. Copyright owners would then be free to negotiate license fees with recording companies and could be paid on the basis of the number of records sold. Outdated music which is played infrequently would not then share in the revenues earned by popular music. Further, broadcasters would not be paying for undesired music as they now are.

Petitioner submits, however, that questions of business justification and precise effects upon competition are beside the point. Although the trial court in its opinion placed great reliance upon the business excuse for ASCAP's existence and methods (App. "B"), this court has ruled that tying arrangements, once found to exist, "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Northern Pac. Ry. v. United States, supra,* 356 at 5.)

The Decision Below Is so Inconsistent with Other Decisions Which Have Considered the Same Issues That the Application of the Antitrust Laws to Music Copyrights Is Now in a State of Confusion

1. Several other lower courts have considered the question of whether ASCAP and its members are violating

the antitrust laws and they have consistently found violations. The present case is the first one in which the decisions have been otherwise.[7]

Two lower cases were strikingly similar to the present case. In *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), the issue was whether music copyright owners forfeited their rights to recover for infringement because of their membership in ASCAP. In *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), over one hundred moving picture theater owners sued ASCAP for damages and injunctions under the Clayton Act. In both, the copyright owners and ASCAP lost and the theater owners prevailed.

The facts of each were identical to the facts of the present case, except that the 1941 consent decree then governing ASCAP's illegal activities did not permit the federal courts to fix the rates charged. Most significantly, the 1941 consent decree permitted the copyright owners to "deal individually with anyone seeking a license for performance of their compositions." (*M. Witmark & Sons v. Jensen, supra*, 80 F. Supp. at 845.) And again significantly, it was established that "the right of granting individual licenses by the individual copyright owner [was] 'illusory.'" (*Ibid.*) Nevertheless, and contrary to the decision of the court below, each court held that this "has all the evils of block booking which was analysed

7. *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *Buck v. Gallagher*, 36 F. Supp. 405 (W.D. Wash. 1940); *Buck v. Swanson*, 33 F. Supp. 377 (D. Neb. 1939). See also *Watson v. Buck*, 313 U.S. 387 (1941); *Marsh v. Buck*, 313 U.S. 406 (1941); *Buck v. Gallagher*, 307 U.S. 95 (1939); Justice Black dissent in *Gibbs v. Buck*, 307 U.S. 66, 81 (1939); *Affiliated Music Enterprises v. SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958).

and condemned in *United States v. Paramount Pictures.*" (*Alden-Rochelle, Inc. v. ASCAP, supra,* 80 F. Supp. at 895.) Further, the *Witmark* court held that the copyright owners "acting in concert through ASCAP, fix prices and completely control competition and thereby restrained trade in violation of Section One of the Sherman Anti-Trust Act." (*M. Witmark & Sons v. Jensen, supra,* 80 F. Supp. at 850.) The members of ASCAP in transferring all their non-dramatic performing rights to ASCAP were held a "combination in restraint of interstate trade and commerce, which is prohibited by Sec. 1 of the anti-trust laws." (*Id.* at 844.)

Again contrary to the results in the present case, the *Alden-Rochelle* court stressed that a "combination of copyrights and a pooling of the proceeds derived from the licensing of the copyrights through the illegal combination, renders unenforceable the rights granted under the Copyright Act, at least while the illegal combination continues. See *Morton Salt Co. v. G. S. Suppiger Co.,* 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363; *B. B. Chemical Co. v. Ellis,* 314 U.S. 495, 62 S.Ct. 406, 86 L.Ed. 367, and *United States v. Line Material Co.,* 333 U.S. 287, at Page 310, 68 S.Ct. 550 . . ." (*Alden-Rochelle, Inc. v. ASCAP,* 80 F. Supp. at 904.) Further, the court below ignored the rule that in patent and copyright infringement suits it is unnecessary to decide whether the anti-trust laws were violated because the maintenance of the improper suits "is contrary to public policy generally." *Morton Salt Co. v. Suppiger,* 314 U.S. 488, 494 (1942). "It is sufficient to say that in whatever posture the issue may be tendered courts of equity will withhold relief where the patentee and those claiming under him are

using the patent privilege contrary to the public interest." (*Mercoid Corporation v. Mid Continent Investment Co.*, 320 U.S. 661, 660 (1944).)

The confusion is compounded by a decision of the very court which presides over the ASCAP consent decree. In *Affiliated Music Enterprises v. Sesac, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958) involving pooling of musical copyrights Judge Ryan held "pooling agreements are per se violations of the antitrust laws." (*Affiliated Music Enterprises v. Sesac, Inc., supra*, 160 F. Supp. at 875.) More startling, the court below ignored Judge Ryan's statement that offering individual per piece licenses as an alternative to blanket licenses is merely the "lesser of two evils" with "no 'genuine economical choice' between the two types of licenses." (*Ibid.*)

The decision below also conflicts with a recent decision of a Washington State court, *Cascade Broadcasting Company v. ASCAP*, Superior Court of the State of Washington in and for Yakima County, No. 45877 (App. "D"). As recently as last year on the same facts as the present case, the Washington court relying upon *Loew's, Paramount Pictures* and patent infringement cases, ruled that ASCAP's system of blanket and per program licenses was an illegal "tying of one copyright to another for the purpose of a package or blanket sale" (*Id.*, Part I at 17), and that the consent decree's disinfection of violations by permitting individual licensing "is so impractical it is no alternative at all" (*Id.*, Part II at 4) (App. "D").

2. The court below plainly misapprehended the reach of the *Mercoid* and *Morton Salt* decisions when it failed to comprehend ASCAP's activities in their overall per-

spective. Infringement suits standing alone may not be sufficient to sustain a charge of abuse, but should be "considered with the entire monopolistic scheme which preceded them" (*Kobe, Inc. v. Dempsey Pump Co.*), 198 F.2d 416, 425 (10th Cir. 1952) *cert. denied* 334 U.S. 837. ASCAP's activities should be considered as an entire picture. Not as isolated incidents but as facets of an overall scheme. In taking its narrow perspective, the decision below "would permit a monopolizer to smother every potential competitor with litigation" (*Ibid.*) and permit "the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition" (*Id.* at 424).

3. Finally, the lower court's decision is in direct conflict with this court's rule that having the option to refuse to deal gives no defense. The decision below erroneously stresses that petitioner "could have refrained from giving public performances for profit of music in ASCAP's repertory."[8] This gives respondents no excuse. The fact that one "can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws." *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964). The lower court failed to recognize that the abuse is "occasioned by the necessity that defendant make a choice among alternatives each of which had an adverse economic effect on its business." (*Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F. Supp. 51, 72 (N.D. Ill. 1965).) Although it was petitioner's choice, "it was the necessity of having to choose

8. Compare the four exculpatory options stressed by the lower court: (1) blanket licenses, *i.e.*, tying agreements, (2) per program licenses, *i.e.*, tying agreements, (3) individual licenses, *i.e.*, impossibility, (4) refusal to deal, *i.e.*, coercion (App. "C," p. A-24).

that occasioned the injury." (*Ibid.*) In the present case the alternatives were coercive; therefore petitioner could properly refuse to take a license.

Petitioner submits that the decision below is inconsistent with all the cases considering the same issues involving pooling of copyrights. If it is allowed to stand the intent and meaning of the antitrust laws as applied to music licensing will be and remain in a state of confusion.

CONCLUSION

This petition raises substantial and important questions concerning the extent of the antitrust laws application to music licensing. The decision has far-reaching effects upon thousands of broadcasting stations and thousands of copyright owners and involves millions of dollars in fees paid annually. Because no authorities were cited and no decisions compared the lower courts failed in their duties to inform and guide and the state of the law is confused and uncertain. At this moment several similar cases are pending and will be tried unless this court grants this petition. Grave and sweeping precedents are implied, namely that music copyrights are to be given exceptional treatment, that prices among competitors can be fixed by courts, that courts may act as rate-making agencies, that block booking can be avoided by providing impossible alternatives, and infringement suits can be used as weapons to coerce. Finally, the "perplexing problem" of whether a consent decree immunizes against vio-

lations of the antitrust laws is left unanswered.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX "A"

Statutes Involved

The Copyright Law

Section 1 of the Copyright Law, 17 U.S.C. Sec. 1 provides in pertinent part:

> "Sec. 1. Exclusive rights as to copyrighted works
>
> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> • • •
>
> "(e) To perform copyrighted work publicly for profit if it be a musical composition; . . ."

Section 101 of the Copyright Law, 17 U.S.C. Sec. 101, provides in pertinent part:

> "Sec. 101. Infringement
>
> "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> "(a) Injunction. — To an injunction restraining such infringement;
>
> "(b) Damages and profits; amount; other remedies—To pay to the copyright proprietor such damages as the copyright proprietor may have offered due to the infringement, • • • or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, • • • and such damages shall in no . . . case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty."

Section 116 of the Copyright Law, 17 U.S.C. Sec. 116, provides:

> "Sec. 116. Costs, attorney's fees

"In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the cost."

The Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act, 15 U.S.C. Sec. 2, provides in pertinent part:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor."

Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, provides in pertinent part:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

Section 16 of the Clayton Act, 15 U.S.C. Sec. 26, provides, in pertinent part;

"Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss of damage by a violation of the antitrust laws, including Sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger or irreparable loss or damage is immediate. . . ."

APPENDIX B"

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

TEMPO MUSIC, INC., ET AL., *Plaintiffs,* vs. INTERNATIONAL GOOD MUSIC, INC., *Defendant.*	CIVIL ACTION No. 5548
IRVING BERLIN, ET AL., *Plaintiffs,* vs. INTERNATIONAL GOOD MUSIC, INC., *Defendant.*	CIVIL ACTION No. 5773
COLE PORTER, ET AL., *Plaintiffs,* vs. ROGAN JONES and INTERNATIONAL GOOD MUSIC, INC. *Defendants.*	CIVIL ACTION No. 242 (Bellingham)
GERSHWIN PUBLISHING CORPORATION, ET AL., *Plaintiffs,* vs. K-91, INC., *Defendant.*	CIVIL ACTION No. 5771
IRVING BERLIN, ET AL., *Plaintiffs,* vs. WESCOAST BROADCASTING CO., *Defendant.*	CIVIL ACTION No. 2258

BETTY COMDEN, ET AL., *Plaintiffs,* *vs.* WESCOAST BROADCASTING CO., *Defendant.*	CIVIL ACTION No. 2415

Memorandum Opinion

SOLOMON, JUDGE: September 15, 1964

Irving Berlin, Richard Rodgers, Cole Porter and other owners of copyrights to more than 150 musical compositions, including such well-known songs as "White Christmas", "Easter Parade" and "Day and Night", filed actions against three radio broadcasting corporations and Rogan Jones, the president and principal stockholder of one of them, claiming violations of the federal copyright law. They seek statutory damages, orders enjoining defendants from future infringement of their copyright works, as well as attorney fees and costs.

Defendants admit the expropriation and the infringement of plaintiffs' copyrights, but they assert that plaintiffs are barred from maintaining this action because, among themselves and in conjunction with the American Society of Composers, Authors and Publishers (ASCAP), plaintiffs have conspired to fix prices and to engage in other unlawful practices in violation of the Constitution and the laws of the State of Washington, particularly Chapter 218, 1937 Session Laws (RCWA, Chapter 19.24) and the federal antitrust laws. Defendants also assert that plaintiffs have unlawfully extended their individual copyright monopoly in violation of the copyright laws, and that by reason of "unclean hands" they have neither

legal nor equitable standing to maintain these actions.

Defendants' at an earlier stage of these proceedings, before a different Judge, moved to join ASCAP as a party. The motion was denied. However, the defendants assert that while ASCAP may not be a necessary party, its activities are relevant because it acts as a licensing agent for the plaintiffs and because of plaintiffs' illegal arrangements with it.

Plaintiffs are among 8800 members of ASCAP, whose combined inventory of over one million musical compositions is commonly referred to as the ASCAP repertory. The relationship between ASCAP and its members, as well as the operations of ASCAP as a licensing agent of the members, has been under the scrutiny of the United States Department of Justice for more than a decade. Its practices are guided by the Amended Final Decree of 1950 and the order entered in the same action on January 7, 1960. All of the plaintiffs granted ASCAP a non-exclusive right to license non-dramatic performances for profit of their copyrighted compositions.

Under the terms of the Amended Final Decree, ASCAP may not license the use of the individual compositions except on application of both user and copyright owner and ASCAP may not refuse to license prospective users of compositions from its repertory. In case of disputes concerning license fees, the Amended Final Judgment provides for judicial determination of reasonable fees in the United States District Court for the Southern District of New York.

Plaintiffs have reserved the right to license their own compositions to any user on any mutually agreeable basis,

and in these cases the plaintiffs as individuals seek to enforce their copyrights.

Most of the evidence in this case was stipulated in a long and carefully prepared pre-trial order. I have studied the statement of admitted facts, the evidence adduced at the trial, the exhibits, as well as the excellent memoranda of authorities submitted by both the plaintiffs and the defendants, and I have concluded that the plaintiffs are entitled to prevail.

I had hoped to prepare a written opinion setting forth not only my reasons for such conclusion, but also an analysis of the authorities upon which I relied. However, illness as well as the press of other judicial business has prevented me from doing this. I believe that the interests of the parties will be served best by announcing my decision without further delay. I also concluded that such an opinion would be of limited value because there are practically no controverted issues of fact and because both plaintiffs and defendants are represented by competent counsel who will present adequately their arguments to the Court of Appeals.

I find that plaintiffs have complied with the statutory requirements of the State of Washington. Defendants have failed to prove that ASCAP's registration of the songs in its repertory was inadequate or that plaintiffs or ASCAP violated the Washington law relating to the pooling of copyright interests without providing for per piece licensing (RCWA 19.24.020); or that the filing of these and other actions by the plaintiffs to enforce their rights under the copyright laws constituted an abuse of either State or Federal process. There is no evidence of any

abusive practices by either the plaintiffs or their licensing agent which would deny them copyright protection.

I further find that there is no merit in defendants' contention that they did not take licenses with ASCAP because they feared State prosecution. I find that they failed to take licenses only because they wanted to avoid paying license fees on the same basis charged other broadcasting companies. I further find that defendants made no attempt to contact plaintiffs individually for the purpose of obtaining licenses to play plaintiffs' songs on a per piece or any other basis.

Defendants have admitted that it would be virtually impossible to deal with the composers on an individual basis for the rights to perform their songs for profit. Their contentions as to what the law requires would not only make it virtually impossible to police the use of copyrighted songs, but would also greatly increase the cost of administration. The enforcement of the Washington statute, as construed by the defendants, would not only jeopardize the efficient licensing and policing of performance for profit, which can only be done by licensing organizations such as ASCAP, BMI or SESAC, but it would also deprive plaintiffs and all other copyright owners of the privilege of profiting from their federally granted copyright monopoly.

To construe the provisions of the Washington statute (RCWA, Chapter 19.24) so as to make the acts of the plaintiffs or ASCAP in this case unlawful would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants. However, even if plaintiffs' conduct in any respect can be considered a violation of either RCWA, Chapter 19.24, or the federal copyright or antitrust laws, their violations are so minimal and the violations of the defendants so unconscionable that plaintiffs should not be deprived of the right to maintain these actions for the deprivation of their property.

I also find the defendant Rogan Jones, who is and has been the dominant influence in defendant International Good Music, Inc., and who has determined its policies for more than 25 years, is equally liable with the corporation for these infringements.

In accordance with Section 101 of the Copyright Law (17 U.S.C.A Sec. 101), plaintiffs have elected to seek statutory damages in lieu of actual damages and profits. For the violation of each copyright, statutory damages not exceeding the sum of $5,000 nor less than $250 may be assessed. Defendants have deliberately appropriated the property of plaintiffs as well as the property of many other copyright owners for more than a quarter of a century, and they have greatly profited by their wrongful conduct. The conduct of International Good Music, Inc., and its president Rogan Jones has been particularly flagrant. However, I have decided to fix damages for each violation at only $350.00 jointly against defendant International Good Music, Inc., and Rogan Jones. I have decided to fix damages against Wescoast Broadcasting Co. and K-91, Inc., for each violation at $250.00.

The prevailing parties are also entitled to attorney fees as part of costs. The parties stipulated that I may fix the fees without taking testimony. I realize that plaintiffs' attorneys will charge much more than I will allow them and that they are entitled to such higher fees. Although $15,000.00 is a modest fee to allow plaintiffs in all of the consolidated cases, I will allow that amount. It may be allocated among the cases in accordance with the amount of statutory damages allowed in each case.

Plaintiffs are also entitled to an injunction restraining the defendants from future infringement of plaintiffs' copyrighted songs.

Defendants' counterclaims are dismissed.

Counsel for plaintiffs shall prepare appropriate findings of fact, conclusions of law and a judgment for plaintiffs, all in accordance with this memorandum opinion.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION and BUXTON HILL MUSIC CORPORATION, *Plaintiffs*, v. K-91, INC., *Defendant*.	CIVIL ACTION No. 5771 JUDGMENT

This action came on for trial before the court, Honorable Gus J. Solomon, United States District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered, and the court having made findings of fact and conclusions of law,

IT IS ORDERED AND ADJUDGED that:

1. Defendant and all persons acting under the direction, control, permission or license of defendant are enjoined and restrained permanently from publicly performing plaintiffs' copyrighted musical compositions and from causing or permitting said compositions to be publicly performed by defendant's radio station or in any place owned, controlled or conducted by defendant and from aiding or abetting the public performance of such compositions in any such place or otherwise;

2. Plaintiffs recover of defendant the amount of $1000, with interest thereon at *the* rate of 6% per annum as provided by law, and the costs of this action;

3. Plaintiffs' costs shall include the amount of $252.31, as an attorneys' fee.

Dated: January 18, 1965.

Clerk of the Court

APPENDIX "C"

United States Court of Appeals For the Ninth Circuit

K-91 INC., *Appellant*, v. GERSHWIN PUBLISHING CORPORATION, ET AL., *Appellees.*	No. 20074

(January 13, 1967)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Before: BARNES, KOELSCH and DUNIWAY, Circuit judges

BARNES, Circuit Judge:

This is an appeal in a civil nonjury case from a judgment in favor of the appellees, the owners of copyrights on various musical compositions. Appellant, a radio station operator in the State of Washington, played these musical compositions on the air without the permission or consent of the appellees. Appellees filed a complaint, under 17 U.S.C. Secs. 1, 101, seeking damages for and an injunction against such infringement. Appellees prevailed, and the court below entered judgment awarding them $1000 damages and enjoining further infringement. The trial court had jurisdiction under 28 U.S.C. Secs. 1337, 1338, and we have jurisdiction of the appeal under 28 U.S.C. Sec. 1291.

Appellant, both in the trial below and on oral argument before this court, admitted the expropriation and infringement of appellees' copyrights, but claimed appellees were misusing their copyrights in violation of public policy generally, and particularly in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Secs. 1, 2. Therefore, appellant contended, no relief should be granted because appellees had come into court with unclean hands. It was charged that appellees had, between themselves and in conjunction with the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), conspired to fix prices and to engage in other unlawful practices, in violation of (a) the Sherman and Clayton Acts, and (b) the laws of the State of Washington, particularly R.C.W. Sec. 19.24.020. Appellant also counterclaimed seeking treble damages and an injunction against further misuse of the copyrights. Fed. R. Civ. P. 13(a), 15 U.S.C. Secs. 15, 26. This relief was denied.

This case cannot be understood without an analysis of the role of ASCAP. ASCAP is an unincorporated membership association comprising over 8000 author, composer and publisher members who own copyrights on various separate musical compositions. (Finding of Fact No. 16, C.T. p. 196). ASCAP functions as a licensing agency for the composers, authors and publishers. When someone in the professional entertainment field wants to perform a copyrighted piece, they merely secure a license from ASCAP rather than seeking out the individual composer, author and-or publisher whose work they want to perform. ASCAP charges a fee or royalty for the license, and its members periodically receive royalty distributions from ASCAP.

In the 1940's the Justice Department became concerned over the operations of ASCAP and its overwhelming position in the entertainment field. Suit was brought under the antitrust laws to prevent restraints of trade by ASCAP, which resulted in the Amended Final Judgment of March 14, 1950, in the United States District Court for the Southern District of New York in Civil Case No. 13-95, 1960 Trade Cas. ¶ 69,612 (S.D.N.Y.). There is no claim in this case that ASCAP and appellees, ASCAP members, have not conformed to the terms of the Amended Final Judgment.

We note three specific requirements of the Amended Final Judgment:

(1) The rights acquired by ASCAP to license the public performance of copyrighted compositions must be non-exclusive;

(2) The license fees or royalties must be reasonable, and if there is a dispute as to the reasonableness of the proposed fee, the fee will be set by the United States District Court for the Southern District of New York; and

(3) A license must be granted on the same terms and conditions to all applicants similarly situated.

Basically, appellant challenges the lower court result in three aspects: (a) failures to make certain findings of fact; (b) failure to find violations of the federal antitrust laws; and (c) failure to find violations of the Washington State antitrust laws. We treat them in that order.

I. *Failures to Make Certain Findings*

Appellant lists eight examples of the court's failure to find. Among them are the facts that: the ASCAP repertory

(inventory of copyrighted compositions) includes more than a million musical compositions; that ASCAP is managed by a Board of Directors which sets the fees for its licenses; that music is a necessity to the broadcasting industry within the State of Washington and throughout the United States; and that each musical copyright is unique. We think that in view of the detailed findings of fact and conclusions of law made by the trier of fact (C.T. pp. 193-217), these eight examples (four of which we have cited) of the failure to make specific findings, are without enough substantial merit to constitute reversible error.

Instead of finding that one million musical compositions were controlled by ASCAP, the court found that ASCAP is made up of over 8000 members (Finding of Fact No. 16, C.T. p. 196); is but one of three music licensing organizations in the United States, which together license substantially all of the copyrighted musical works in the United States (Finding of Fact No. 18, C.T. pp. 196-97); and that fifty per cent of all performances of copyrighted music by broadcasting stations are performances of compositions which ASCAP members have created (*Ibid.*) That "music is a necessity to the broadcasting industry" paraphrases the trial judge's remark that "music is an essential part of the operation of a radio station" (R.T. p. 6). While the statement may not be completely true in this modern age of "two-way radio" or "conversation programs," it has been only too evident to listeners for many years. We can likewise assume that "each musical copyright is unique," though not with the same uniqueness as is implied in a patented article. *Cf.*

Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951).

As to each of the stipulated facts which appellant claims should have been specifically found as facts by the trial court, we find they were either immaterial or redundant in light of the findings made. (The trial judge, on motion for a new trial, found they were "repetitious or irrelevant." (R.T. p. 251)). There was no error in this regard.

II. *ASCAP and the Federal Antitrust Laws*

This litigation skirts a very perlexing problem long existing in federal antitrust law, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws. Fortunately, however, the present case does not call for an answer to this question.

At the beginning of this litigation there were three possible results for appellant's counterclaim based on federal antitrust violations. The court could have found: (1) that there were in fact no violations of the federal antitrust laws; (2) that federal antitrust laws were violated, but since the conduct of the appellees conformed to the earlier consent decree no remedy was available; or (3) that the federal antitrust laws were violated and that the earlier consent decree offered no protection, granting relief to the appellant on its counterclaim. While either of the last two possibilities would have squarely raised

the question of immunity deriving from the earlier consent decree, it was the first possibility which actually occurred. Since the trial court found no violations of the federal antitrust laws,[1] we do not reach the question of whether activities which would otherwise be a violation of the antitrust laws could be rendered immune because consistent with the terms of the consent decree.

We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable; and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activites do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.

1. Conclusions of Law Nos. 15 and 16, C.T. p. 214.

There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved. There was no error in the trial court's finding that appellees have not violated the federal antitrust laws.

III. *ASCAP and the Washington State Antitrust Laws*

The State of Washington has certain antitrust laws relating to copyrights. Copyrighted music and drama are protected by R.C.W. § 19.24.010 (1957), but R.C.W. § 19.24.020 (1957) makes unlawful certain combinations of copyright owners. The latter section provides in part:

> "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: . . . ."

When copyrights are pooled, R.C.W. § 19.24.020 (1957) requires a complete detailed list of the works to be filed each year, together with a list of prices charged or demanded, with the Washington Secretary of State. R.C.W. § 19.24.055 (1957) requires such a list if the music is

used commercially within the state, or originates or is heard therein.

Washington frankly states the purpose of its requirements in R.C.W. § 19.24.060 (1957).[2] There are also special purpose statutes, defining "doing business" with respect to licensing pools such as ASCAP (R.C.W. § 19.24.100 (1957)); providing for appointment of receivers and the escheat of property for persons who refuse to abide by the state copyright laws (R.C.W. § 19.24.140 (1957)); and providing that special appearances in copyright suits are to be deemed general appearances (R.C.W. § 19.24.280 (1957)).

The court below, in findings of fact unchallenged here, noted the previous concern over the application of the Washington statute.

> "38. In 1958, certain broadcasters in the State of Washington stopped paying fees to ASCAP under existing license agreements on the alleged ground that payment of such license fees would violate Ch. 19.24, R.C.W.
>
> "39. The license agreements referred to in Finding 38 expired on December 31, 1958.
>
> "40. In 1959, a group of broadcasters, including eleven broadcasters located in the State of Washington, commenced a proceeding in the United States District Court for the Southern District of New York

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2. "The provisions of this chapter, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state . . . in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this chapter and of the state Constitution; . . ." R.C.W. § 19.24.060 (1957).

under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses to be effective as of January 1, 1959.

"41. In that proceeding, the court ruled that, in the circumstances presented, ASCAP would not be directed to issue licenses to any petitioning broadcasters in the State of Washington.

"42. Thereafter, and until November 20, 1959, ASCAP did not offer licenses to broadcasters in the State of Washington.

"43. On November 20, 1959, the owners of 61 Washington radio stations filed a petition in the United States District Court for the Southern District of New York asking that court to issue an order

"'(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;

"'(b) determining and establishing the terms and conditions of such licenses.'

"44. At the request and with the consent of the petitioners, the court (Ryan, C.J.) entered an order on November 20, 1959 directing ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963. The court ruled:

"'6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24—Laws of 1937, C. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

"7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states.'

"45. The two specified license forms were the so-called 'blanket' and 'per program' radio licenses. Both licenses grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee charged is 2.125% of the licensee's over-all revenues from sale of time on the air, after extensive deductions. Under the per program license, the licensee pays a higher percentage, but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed." (C.T. pp. 204-205)

Appellant seems to feel that since ASCAP was authorized to issue, in addition to other kinds, "blanket" licenses which might arguably be contrary to R.C.W. § 19.24.020 (1957), it has made out a valid defense to the infringement action. If such is its approach, it is mistaken. Appellant has offered no evidence that it applied for a license and could obtain only a blanket license. There is no evidence in the record that appellees did not at all times stand ready to negotiate licenses which would be lawful in the State of Washington.

On the contrary, plaintiffs (appellees here) introduced into evidence (p. Ex. 9) a copy of a letter dated August 23, 1948, from the Washington Attorney General to the Secretary of State, stating ASCAP had, by its filing[3] on April 20, 1948, demonstrated:

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3. Appellees assert that they have, since at least 1961, and each year prior to the filing of the suit on January 16, 1963, filed with the Secretary of State of Washington State a catalog of their copyrighted musical compositions, together with forms of licenses available to all users, and fees therefor. (P. Exs. 1, 5, 6; D. Exs. A-7, A-8, A-8a.)

(a) "it does issue licenses on rates assessed on a per piece system of usage . . . ,"

(b) "it does not issue licenses at a rate in excess of any per piece system in operation in any other state . . . ,"

(c) it had filed "a complete list of their copyrighted works or compositions,"

(d) it had filed "a list completely detail(ing) prices charged and demanded," and

(e) it had listed the date of each copyright, and name of the author, the names of the publishers and the dates of assignment to ASCAP.

The Attorney General concluded there had been "a reasonable compliance with the provisions of Chapter 218[4];" and that "the defects which the Supreme Court pointed out[5] have now been cured." (P. Ex. 9, p. 9 *Cf.* Finding of Fact No. 53, C.T. p. 207).

The trial court found that no public official of the State of Washington had at any time requested ASCAP to make any changes in either the form of substance of its filings. (Finding of Fact No. 52, C.T. p. 207).

Thus it seems clear that at all times, at least since the November 20, 1959 rate fixing hearing in the New York district court (in which eleven State of Washington broadcasters participated) appellant could have obtained a license from ASCAP, valid under Washington law so far as this record before us discloses, to perform publicly for profit any musical composition in ASCAP's repertory, subject only to its obligation to pay a reasonable license fee, as fixed by the New York district court.

4. Laws of 1937; Rem. Rev. Stat. 3830-1 *et seq.*, *the* forerunner of R.C.W. § 19.24.020 (1957).

5. *Taylor v. State*, 129 Wash. Dec. 591 (1948).

As appellees point out, appellant had five options open to it. Four of them were:

(1) Appellant could have obtained a blanket license and along with it the right to play as much or as little, as frequently or as rarely as it desired, any of the compositions in the ASCAP repertory.

(2) Appellant could have obtained a per program license which would have required it to pay a license fee only for those programs in which appellant broadcast music from the ASCAP repertory.

(3) It could have undertaken to deal with ASCAP members directly.

(4) Appellant could have refrained from giving public performances for profit of music in the ASCAP repertory.

Instead, appellant chose the fifth option. Appellant never obtained any license. It never sought to deal with anyone. It continued its unconscionable conduct in unlawfully appropriating appellees' property without cause and without justification.

There seems little purpose in going into detail to discuss further the reason why the court's conclusions of law are not only not erroneous,[6] but are fully supported by the findings of fact, which in turn, find support in the evidence.

We find (1) all filing requirements of the State of Washington have been met; (2) no "extortionate means" nor "terrorizing practices" are found in the bringing of

6. Conclusions of law 5 to 14, inclusive, as to Washington law, and 15 to 18, inclusive, as to federal law.

law suits against infringing broadcasters; (3) R.C.W. § 19.24.020 prohibiting blanket licenses must be read with the proviso contained therein, and raises serious doubt if an absolute prohibition against all blanket licenses was intended; (4) there was no proof of any refusal at any time by an individual appellee to grant, or to negotiate, for a separate license (in fact, there exists no proof that there was ever an attempt to obtain such a license); and (5) any would-be user has the right to have the United States District Court for the Southern District of New York fix what is reasonable as a license fee.

In Conclusion II, the trial judge found: "The ASCAP per program license may reasonably be regarded as assessing rates 'on a per piece system of usage,' as the Washington statute uses that phrase" (C.T. p. 214).

We need not specifically approve or disapprove of the trial court's interpretation of the Washington statute. If the per program license were interpreted as a blanket license and it was found that R.C.W. § 19.24.020 (1957) permits only licenses of specific individual compositions, ASCAP members nevertheless retain the absolute right to license their individual compositions, and the trial court found:

> "Plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster in the State of Washington for a license to perform any of plaintiffs' copyrighted musical compositions on any mutually agreeable basis, including 'rates assessed on a per piece system of usage.' In the last ten years, no broadcaster in the State of Washington has requested such a license from any plaintiff. No defendant has ever made any attempt to contact any plaintiff individually for the purpose of obtain-

ing licenses to play any of plaintiffs' compositions on a 'per piece' or any other basis" (Finding of Fact No. 50, C.T. p. 206).

"In the last ten years, ASCAP has not received any request from any broadcaster in the State of Washington and any ASCAP member in interest for the issuance of a license to perform one or more specified compositions" (Finding of Fact No. 51, C.T. p. 206).

We do not find it necessary to discuss the other points raised in the respective briefs.

We find the trial court's findings and conclusions were properly made, and support the judgment in favor of appellees. That judgment is correct, and is *affirmed*.

United States Court of Appeals
For the Ninth Circuit

K-91 INC.,	*Appellant,*	No. 20,074
v.		DC No. 5771
GERSHWIN PUBLISHING CORP.	*Appellees.*	

APPEAL from the United States District Court for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

A TRUE COPY:
ATTEST: March 1, 1967,
WILLIAM B. LUCK, Clerk,
By: WILLIAM E. WILSON, Chief Deputy.

Filed and entered January 13, 1967.

Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 24, 1967.
HAROLD W. ANDERSON, Clerk
By J. M. BURKE, Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, February 16, 1967

Before: BARNES, KOELSCH and DUNIWAY,
Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed February 8, 1967 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX "D"

IN THE

Superior Court of the State of Washington

IN AND FOR YAKIMA COUNTY

CASCADE BROADCASTING COMPANY, a WASHINGTON CORPORATION

CASCADE BROADCASTING COMPANY, a WASHINGTON CORPORATION (formerly Haltom),

Plaintiffs,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS

Defendant.

No. 45877

MEMORANDUM OPINION

PART I

In Pertinent Part

• • • •

Defendant contends that the requirement of a per piece license is met in this case by the issuance of a per program license. The court feels that this is analogous to block booking. The per program license is oppressive in that it requires people to buy what they do not deisre to use in order to obtain what they do desire to use. ASCAP argues that "per piece" could be interpreted to mean per piece of radio time or television time but there is nothing in the evidence or suggested in the briefs that radio or television time has ever been referred to in such terms. More important, however, the real vice is that they must buy the entire repertoire of ASCAP in order to use a part of it. Now the vice is presumably reduced substantially if, instead of having to buy the entire repertoire of ASCAP for their entire operation, they must only buy it for specified portions thereof. The per program licenses originated after the 1937 statute and are an apparent attempt to comply

therewith. However, it is still a blanket contract in the sense that in order to use any piece in ASCAP's repertoire, on a given program, the plaintiff must buy access to the entire repertoire. It must buy access to items it does not intend to use as well as those it does intend to use. This is the remedy sought to be eliminated; but it is not eliminated, only reduced, by the new form of contract.

The validity of such agreements has not been decided by our State Court but is a common subject of litigation under both the patent laws and the copyright laws in conjunction with Federal Anti-Trust Laws. The litigation in these fields clearly establishes the Federal Court's position respecting the tying of one copyright to another for the purpose of a package or blanket sale. In *United States v. Loews, Inc.*, 9 L.Ed.2d 11 at page 19 there is a discussion of this principle indicating the undesirable effects of "block booking" in the motion picture and television industry. This case relies in part upon the *Mercoid v. Mid-Continent Investment Co.* case, *supra*, and *United States v. Paramount Picture*, 92 L.Ed. 1261, which in turn, follow generally the rules established in patent cases. The vice lies in the fact that the licensor through the tying arrangement, is attempting to compel the purchase of an undesired item or less desired item in order to permit the purchase of the desired item.

In the case at bar it is clear that many prominent composers assign their rights to the defendant ASCAP and much of the music that ASCAP has under license is highly desirable and, perhaps, indispensable, to the operation of a radio or television station. A system of blanket licensing, either by licenses for the entire operation of plaintiff, or in a per program basis, requires plaintiff to also purchase items in the ASCAP repertoire that are not de-

sired or which do not seem as desirable as works available through S.E.S.A.C. or B.M.I., or other organizations of like nature, thus motivating plaintiffs to purchase ASCAP compositions in preference to comparable compositions obtainable through ASCAP's competitors. This court is of the opinion that R.C.W. 19.24 was designed to prevent just such a development.

It should be made clear the fact that the fee for defendant's music is measured by the licensee's income derived from the use thereof does not offend the statute. A fault lies in the fact that in the contracts in question the fee for a given program is not related to the actual contribution that a given ASCAP composition, or even the whole ASCAP repertoire, makes to the production of that program. The ASCAP compositions may constitute ten percent or one hundred percent of the program and the fee would be the same. The court feels that this is one of the results intended to be avoided by the statute.

Accordingly, this court holds that the licenses offered by defendant are violative of R.C.W. 19.24.

BLAINE HOPP, Jr.
Judge.

PART II

In Pertinent Part

• • • •

DUE PROCESS

As this court has previously stated, the evil sought to be remedied by the Washington Act is, among other things, the compulsion to buy a product one does not want as a precondition to buying a product one does want. The argument here made is that there is no compulsion to be dealt with. This necessitates a review of the evidence. The evidence demonstrates clearly that it is a practical impossibility for individual stations to

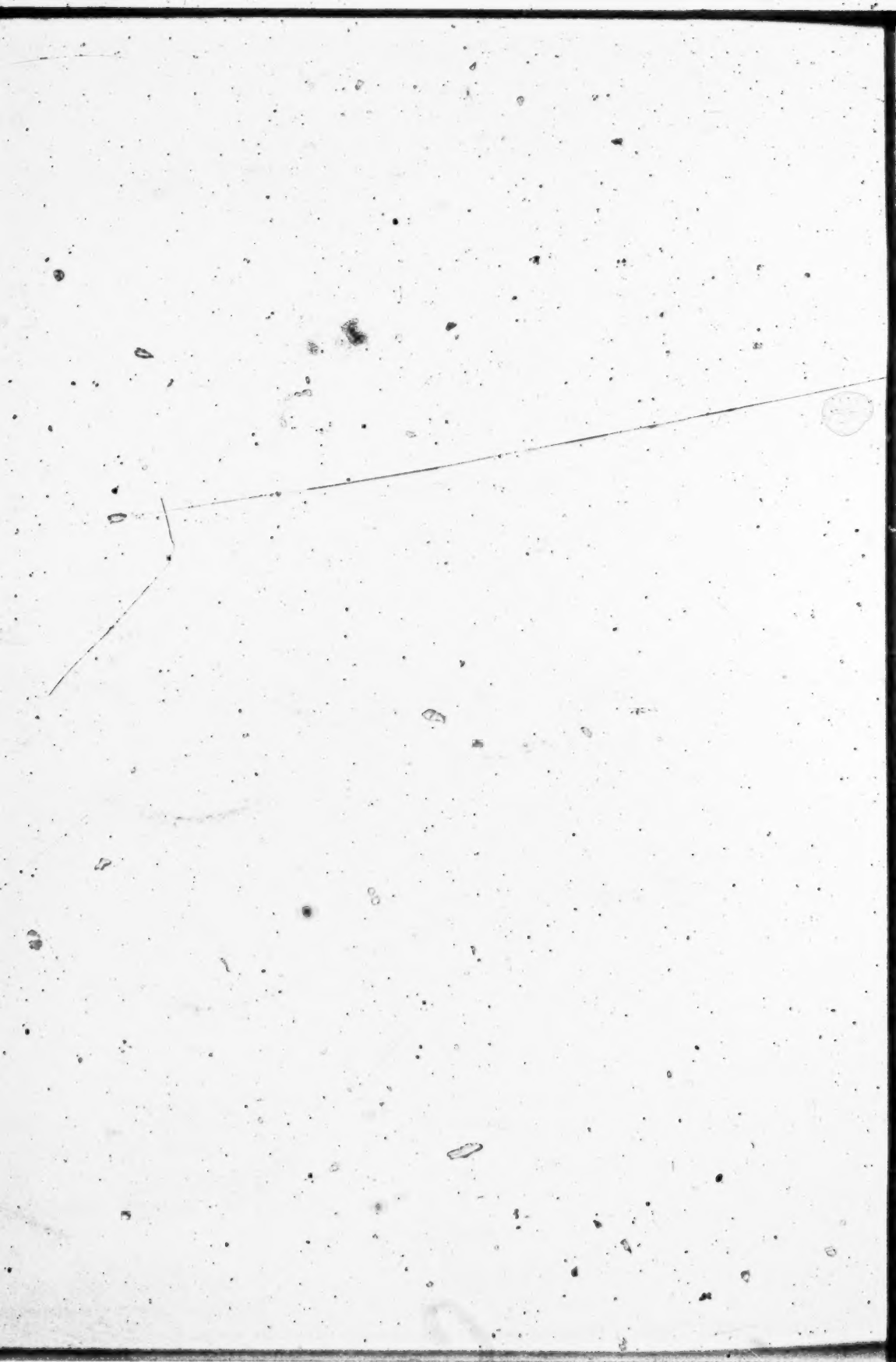
deal directly with individual composers and publishers in respect to the musical compositions available through ASCAP, BMI and SESAC. ASCAP has a repertoire of over a million compositions owned by 11,000 authors and publishers. Individual radio stations play 100 to 250 compositions a day involving hundreds of different compositions per year. The negotiation of each use on an individual basis is virtually impossible. The difficulties of individual negotiation gave rise to the creation of the defendant organization, even before the broadcasting industry existed. The creation of ASCAP and its counterparts facilitated the negotiations for use of copyrighted music and made such negotiation possible where it had been (and would now be) otherwise impossible. In this respect defendant, or like organizations, is virtually indispensable to the marketing of copyrighted music. Along with its usefulness, however, the creation of ASCAP and its counterparts (BMI and SESAC) gave rise to a monopolistic situation in the music industry comparable to that discussed in *Affiliated Music Enterprises v. SESAC*, 160 F.S. 865. ASCAP controls such an appreciable part of the available music as to make it a matter of economic compulsion for broadcasters to deal with ASCAP. Most stations could not operate without ASCAP compositions and survive.

A station's only alternative to blanket or per program licenses is to deal individually with copyright owners. This is so impractical it is no alternative at all.

As a result, ASCAP, unless legally prohibited, is in such a dominant position in its industry as to compel music users to deal with it and on ASCAP's terms, subject only to the provisions of the Federal Court order. The blanket licenses offered by ASCAP is comparable to the block booking prohibited by Federal law. (See *U.S. v. Paramount Pictures*, 334 U.S. 131; 68 S. Ct. 915, 93 L.Ed. 1260).

The per program is in principle the same. Both licenses require the purchase of the right to use the whole repertoire in order to use a

single part of it. While the Federal Court, presumably because of the control it exercises over the ASCAP operation, has approved blanket and per program licenses, it cannot be said that there is no reasonable relationship between the state's prohibition of a misuse thereof and the evil the state attempts to cure. The blanket license, like the block booking of motion picture, is not inherently evil. It is evil only because, as so ably stated in *Affiliated Music Enterprises v. SESAC, supra,* no "genuine economic choice" exists under which broadcasters can contract for individual compositions. If such a "genuine economic choice" existed then defendant's argument would have much force. The evil of economic *compulsion* to purchase undesired compositions in order to purchase the desired compositions is the evil the legislature attempts to cure. That evil is cured if the compulsion is removed. The removal of this evil does not necessitate *absolute* prohibition of blanket or per program licenses. Voluntary dealing in blanket licenses is not evil *per se*. It may have beneficial results for both parties in cutting the cost of doing business. The *absolute* prohibition of blanket and-or per program licenses is unnecessary to cure the evil intended to be cured, unless a "genuine economic choice" cannot otherwise be made available to music users. As hereinafter discussed, the court finds that such a choice —to purchase music on a per piece basis—can be made available to users by copyright owners without undue economic burden. For this reason, the absolute ban upon blanket licenses is unnecessary to the end intended by the legislature. • • • •



SUPREME COURT, U. S.

JUN 8 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1375~~ 147

K-91, INC.,

Petitioner,

v.

GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION and BUXTON HILL MUSIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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June 7, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

K-91, INC., *Petitioner,* v. GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION and BUXTON HILL MUSIC CORPORATION, *Respondents.*	No. 1375

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents submit this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the United States District Court for the Western District of Washington (Solomon, J.) is printed as Appendix B to the petition.

The opinion of the Court of Appeals for the Ninth Circuit is printed as Appendix C to the petition.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1).

Question Presented

The question presented by the petition is whether the District Court and the Court of Appeals erred in finding that the activities of the American Society of Composers, Authors & Publishers ("ASCAP"), an unincorporated membership association to which each respondent belongs, did not constitute a combination in restraint of trade or a monopoly within the meaning of the antitrust laws.

The Decisions Below

This is an action for copyright infringement which respondents commenced in the United States District Court for the Western District of Washington, Northern Division (R. 1).* Respondents are the copyright proprietors of the four musical compositions named in the complaint.

Petitioner is the owner and operator of radio station KIXI in Seattle, Washington.

This action was consolidated for trial together with five other infringement actions commenced by respondents and other copyright proprietors against two other radio broadcasting corporations in Washington and the president and principal stockholder of one of them. (The actions were tried before the Honorable Gus G. Solomon, Chief Judge of the United States District Court for the District of Oregon, sitting in these cases pursuant to designation by the district court judges in Washington.)

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*"R." refers to documents in the record on appeal in the Court of Appeals as listed in petitioner's designation of the record on appeal and respondents' counterdesignation. "Tr." refers to pages in the trial transcript. "P. Ex." refers to plaintiffs' (respondents') exhibits. "D. Ex." refers to defendant's (petitioner's) exhibits. "App." refers to pages in the appendices annexed to the petition.

The District Court, after studying the statement of admitted facts, the evidence advanced at the trial, the exhibits and the memoranda of authorities submitted by the parties, concluded that (App. B, p. A9):

> "Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants."

Although the trial court found that petitioner had deliberately appropriated respondents' property and had greatly profited by its wrongful conduct, the Court fixed damages against petitioner at the statutory minimum of $250 per infringement for each of the four infringements alleged in the complaint (R. 37, Conclusion 20).

The Court of Appeals, after careful consideration of the impact of the Amended Final Judgment, affirmed the District Court's decision. Judge Barnes, speaking for the Court, wrote (App. C, pp. A18-A19):

> "We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable; and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the

price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree.

"There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved. There was no error in the trial court's finding that appellees have not violated the federal antitrust laws."

Statement

Introduction

Petitioner's statement contains many errors and large amounts of irrelevant material.* It becomes necessary, therefore, to state the relevant facts, as stipulated by the parties before trial (R. 30) and as found by the trial court (R. 37) and affirmed by the Court of Appeals.**

*It would be pointless to correct each of the numerous factual errors contained in the petition. But, by our failure to correct petitioner's misstatements, we by no means acquiesce in them.

**In the Court of Appeals, petitioner sought to find error in the failure of the trial court to make certain findings of fact. The Court rejected petitioner's contentions (App. C, pp. A15-A17) and they have not been repeated here.

To begin, it is important to place in its proper perspective petitioner's conduct which gave rise to this lawsuit, particularly in view of (1) the statement in the petition that this is some kind of "test case" and (2) petitioner's claim that it has admitted infringing respondents' copyrights in order to present some other issues clearly for decision (Pet., pp. 3-4).

We are not here concerned with just four admitted infringements of respondents' copyrights. The trial court found that petitioner had regularly broadcast the musical compositions of respondents and of other authors, composers and publishers over its radio station, for profit, without the consent of the copyright owner or any licensing agency and without the payment of any royalty or compensation of any kind to any person (R. 37, Fact 8).

This was done, the trial court found, "pursuant to deliberate policy, long persisted in, and without any regard to the rights of plaintiffs and other copyright proprietors under the federal copyright law" (R. 37, Fact 9).

These facts permit no conclusion but that petitioner was a deliberate and willful infringer. The trial court so found, and its finding was not challenged in the Court of Appeals and is not here challenged.

The Affirmative Defenses

Accordingly, all that remained for consideration in the courts below was the sufficiency of the affirmative defenses urged by petitioner as justification for its appropriation of respondents' property. Of the affirmative defenses, only one has been urged in this Court:* petitioner contends that respondents, together with ASCAP, have violated the

*The other defenses urged by petitioner in the courts below were based on respondents' alleged violation of a Washington statute, Ch. 19.24, R. C. W. Clearly, the decisions of the lower courts—that there had been no violations of Washington law—raise no issues warranting review by this Court.

federal antitrust laws in the use of their copyrights and are therefore barred from maintaining this action.

At the trial of this action and in the Court of Appeals, it was abundantly demonstrated that there was no merit in petitioner's affirmative defense based on the federal antitrust laws—neither factually nor legally.

The District Court so held and the Court of Appeals affirmed. The decisions below were clearly correct.

The Respondents and ASCAP

Respondents and the other plaintiffs below—among them Richard Rodgers, Irving Berlin and the late Cole Porter—include some of the most talented and successful writers of popular music in the United States today. They are all members of ASCAP, an unincorporated membership association which is organized under the laws of the State of New York and has over 8,800 authors, composers and publisher members who own copyrights in separate musical compositions (R. 30, Facts 10, 11).

Before the organization of ASCAP, there was no effective method by which individual writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher could take the measures necessary to negotiate licenses with all users or to detect all unauthorized uses and secure legal redress. Conversely, music users who wished to perform thousands of works each year without risk of infringement had no practical means of obtaining licenses from the owners of all those works.

As a means of solving the problems of both the copyright owners and the users of music, ASCAP was organized in 1914 as an unincorporated association representing both writers and publishers.

ASCAP's Relations with its Members

Each member of ASCAP, including respondents, has granted to ASCAP only the *non-exclusive* right to license non-dramatic public performances for profit of all the compositions written, composed or published by such member during the term of his membership in ASCAP, and has received the right to share in the royalty distributions made by the Society.

Thus, each member of ASCAP remains absolutely free to license public performances of his musical compositions. And a would-be licensee is free to deal either with the individual copyright proprietor or with ASCAP.

The relationship between ASCAP and its members is governed by the ASCAP Articles of Association, by agreements executed by each member and by the Society, the "General Agreement" (D. Ex. A-5), and the "Television Agreement" (P. Ex. 10), by the extensive provisions of the Amended Final Judgment of March 14, 1950 (D. Ex. A-2), entered on consent in an antitrust action entitled *United States* v. *ASCAP*, Civil Action No. 13-95 (D. C. S. D. N. Y.), and by the Order of January 7, 1960 (D. Ex. A-3), entered in the same action. The Amended Final Judgment and the Order are the decrees now in effect; they superseded an earlier judgment, entered on consent in 1941.*

*The Court will note that in major respects the General Agreement and the Television Agreement are modified by the Amended Final Judgment of 1950. For example, the General Agreement (which was for the term 1941-1965 and was drawn up in 1940) provides on its face that the member "sells, assigns, transfers and sets over unto the Society . . . the right of public performance . . . in each musical work" of which the member is the copyright proprietor (D. Ex. A-5). But each copy of the General Agreement has had stamped upon its face language indicating that it is modified by and subject to the Amended Final Judgment. This latter document enjoins ASCAP from "Holding, acquiring, licensing, enforcing or negotiating con-

In distributing royalties, ASCAP acts as a clearinghouse for its members. In essence, royalty distributions are keyed to and are dependent upon an objective survey of the music actually played by radio and television broadcasters and other users. The ASCAP survey is supervised by the District Court in New York. Thus, the copyright proprietors of all music are rewarded commensurate with the popularity of their music as revealed by the objective survey. Popular music does not, as petitioner suggests, subsidize outdated music.

ASCAP's royalty distributions are regulated by the provisions of the Amended Final Judgment and the Order of January 7, 1960.

ASCAP's Licensing Activity

ASCAP licenses many thousands of users of music throughout the United States, ranging from the three national television networks to the local tavern which employs musicians for Saturday nights.

Most users want—and receive—the right to perform as often as they wish any of the more than one million musical compositions in ASCAP's repertory. One of the defendants below, for example, broadcasts 60,000 playings of musical compositions per year (R. 37, Fact 12).

Thus it may fairly be said that ASCAP performs a virtually indispensable service both for its members and for the users of the members' music. The trial court found (R. 37, Fact 25):

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cerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis" (D. Ex. A-2, Sec. IV[A]). The Amended Final Judgment defines "right of public performance" as meaning "the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner" (D. Ex. A-2, Sec. II[B]). Hence, as a result of the Amended Final Judgment, ASCAP receives under the General Agreement only a non-exclusive right to license non-dramatic public performances for profit.

> "The licensing of public performances for profit of copyrighted musical compositions by licensing organizations such as ASCAP is the only practical way by which copyright proprietors may exercise their federally-granted right to license non-dramatic performances of their copyrighted compositions. No single copyright proprietor could deal individually with all would-be users of his copyrighted compositions, and it would be impossible for him to police the use of his copyrighted songs. Equally, most broadcasters and other users of copyrighted music could not deal separately with the thousands of copyright proprietors whose music they perform."

ASCAP's licensing activity is regulated and controlled in virtually every detail by the Amended Final Judgment of March 14, 1950 (D. Ex. A-2).*

The central theme of the Amended Final Judgment is that it guarantees any user the right to perform ASCAP music. He may deal on an individual basis with each member or on a collective basis with ASCAP. If he prefers a collective license he is assured that he will pay no more than a fair license fee.

Under Section IX of the Amended Final Judgment, when any would-be user of some or all of the compositions in the ASCAP repertory applies to ASCAP for a license, ASCAP is required to advise him of the fee which it deems reasonable for the license requested. The making of the application operates automatically to license the applicant. If the parties are unable to agree upon a reasonable fee, the applicant may apply to the United States District Court for the Southern District of New York for determination of a reasonable fee. In any such proceeding, the burden is on

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*The Amended Final Judgment of 1950 is set out in Appendix A to our brief.

ASCAP to establish the reasonableness of the fee which it has requested.

Petitioner's statement that "ASCAP is permitted to fix the license fees it will charge," with the District Court having the power "to review the reasonableness of the proposed fee and set a different fee" (Pet., p. 6), simply misconceives the impact of Section IX. ASCAP has no power whatsoever to fix a license fee under that section—it can only offer and negotiate. And, if the parties cannot agree, ASCAP—not the user—has the burden of establishing the reasonableness of the fee which it has requested.

Once a reasonable fee has been finally determined by the Court, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP (D. Ex. A-2, Sec. IX[C]). And even without a Court order fixing a fair rate, ASCAP is forbidden at all times to discriminate "in license fees or other terms and conditions between licensees similarly situated" (D. Ex. A-2, Sec. IV [C]).

Thus, any would-be user of any part of ASCAP's repertory, including petitioner, is guaranteed that he can use that music and that he will pay no more than a fair license fee. For he has an absolute right to be free of discrimination; he is assured of equal treatment.

And if a would-be user for any reason desires not to deal with ASCAP, he is free to negotiate individual licenses with individual copyright proprietors. For under the Amended Final Judgement, as we have seen, each individual member of ASCAP retains the right to license public performances for profit of his musical compositions, and ASCAP is forbidden to license individual compositions except upon specific written request of both the member and the user (D. Ex. A-2, Sec. VI).

Would-be users of ASCAP music have made extensive use of the provisions of Section IX of the Amended Final

Judgment. In the past, when existing ASCAP licenses with radio or television broadcasters were about to expire, the broadcasters have joined together in industry-wide committees for the purpose of negotiating new terms with ASCAP (R. 37, Fact 30). On occasion, negotiations have been unsuccessful and the broadcasters have exercised the rights conferred by Section IX and commenced court proceedings for determination of a reasonable license fee (R. 37, Fact 30).

ASCAP's Washington Licensing

The Amended Final Judgment of course controls ASCAP's licensing activity with respect to broadcasting of music in the State of Washington, just as it controls in the other forty-nine states—and broadcasters in the State of Washington, like broadcasters in the rest of the United States, have exercised the rights conferred by Section IX. Indeed, the only licenses ASCAP now issues to broadcasters in the State of Washington were the product of a recent Section IX proceeding. Accordingly, it is pertinent briefly to review that proceeding:

1. *The 1959 rate proceeding.* In the years before 1959, some Washington broadcasters decided not to enter into license agreements with ASCAP; nor did they seek individual licenses from composers or publishers. This was, of course, their right. No broadcaster has any obligation to broadcast copyrighted music. If he broadcasts no material copyrighted by an ASCAP member, he needs no license from ASCAP or any member. But certain broadcasters wanted it both ways; they regularly broadcast copyrighted music and paid nothing to any copyright owner.

Other Washington broadcasters, perhaps mindful of their obligations under federal law or basic principles of

fairness, obtained licenses, paid license fees and so did not infringe.

Prior to 1959, some of the Washington broadcasters who had entered into agreements with ASCAP refused to pay the agreed license fees on the alleged ground that payment would violate a Washington State statute, Ch. 19.24, R. C. W. (R. 37, Fact 38, Tr. 341).

ASCAP's agreements with broadcasters in Washington and throughout the United States expired on December 31, 1958 (R. 37, Fact 39, Tr. 341). Early in 1959, a group of more than 700 radio broadcasters from all over the country, acting as an "all-industry committee," commenced a proceeding in the United States District Court for the Southern District of New York under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses, effective as of January 1, 1959 (R. 37, Fact 40, Tr. 341). Included among the petitioners were eleven broadcasters located in the State of Washington (R. 37, Fact 40, Tr. 341).

In that proceeding, the Court ruled that, in the circumstances presented—the refusal of certain Washington broadcasters to pay the agreed license fees on the asserted ground that payment would violate the Washington statute —ASCAP would not be required to issue licenses to any petitioning broadcaster in the State of Washington (R. 37, Fact 41, Tr. 341-342). Thereafter, during the pendency of that proceeding, until November 20, 1959, ASCAP did not offer licenses to Washington broadcasters (R. 37, Fact 42, Tr. 342).*

In the interim, negotiations were had by ASCAP's general counsel, Herman Finkelstein, and Ronald A. Murphy, president and counsel of the Washington State

*The foregoing facts constitute what petitioner describes as ASCAP's "refusal" to issue licenses to radio stations in Washington.

Association of Broadcasters. Mr. Murphy is counsel to petitioner in this case.

On November 20, 1959, Mr. Murphy filed a petition in the United States District Court for the Southern District of New York on behalf of nearly all the Washington broadcasters—the owners of 61 Washington radio and 7 television stations (P. Ex. 11). These petitioners asked the Court to issue an order (P. Ex. 11):

> "(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;
>
> "(b) determining and establishing the terms and conditions of such licenses."

At the request and with the consent of the petitioners, the Court (Ryan, C. J.) entered an order, on November 20, 1959, directing ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963 (P. Ex. 12).* Chief Judge Ryan found (P. Ex. 12):

> "6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation

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*The 1959 rate proceeding involving Washington broadcasters, as well as prior and subsequent rate proceedings in which broadcasters all over the United States, acting through all-industry committees, have exercised the rights conferred by Section IX, demonstrate the lack of merit in petitioner's contention that Section IX confers only illusory rights on broadcasters located on the West Coast.

of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24—Laws of 1937, C. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

"7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states."

The two specified license forms were the so-called "blanket" and "per program" licenses (R. 37, Fact 45). In broad terms, both licenses grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee payable is computed on the basis of the licensee's over-all revenues from sale of time on the air, after certain deductions (R. 37, Fact 45). Under the per program license, the licensee pays a higher percentage but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed (R. 37, Fact 45).

2. *Petitioner's refusal to take a license.* Although petitioner did not participate as a party in the 1959 rate proceeding, it knew what was going on (R. 30, Fact 75, R. 37, Fact 46). From time to time during the negotiations between ASCAP and petitioners, and subsequent to November 20, 1959, Mr. Murphy, counsel for the petitioning

radio and television stations, advised *all* Washington broadcasters of Chief Judge Ryan's order (P. Ex. 13).

Petitioner decided not to take advantage of either of the licenses made available under Chief Judge Ryan's order (R. 30, Facts 76, 77, R. 37, Facts 47, 48). It did, however, continue to infringe.

3. *Other infringers.* Petitioner was not the only infringing broadcaster in the State of Washington. Other stations—including some which had been petitioners before Chief Judge Ryan—also decided to infringe rather than pay the license fees which the Court had found to be fair, reasonable, and non-discriminatory.

Beginning in 1961, respondents and other copyright proprietors commenced lawsuits against 11 unlicensed radio stations in the State of Washington, including the present petitioner and the other defendant's below (R. 30, Fact 40, R. 37, Fact 63).

Except for this case, all of these lawsuits have now been settled by the broadcasters' taking ASCAP licenses retroactive to 1959—thus putting the infringers on a par with the broadcasters who had taken the licenses issued pursuant to Chief Judge Ryan's order (R. 49).*

Petitioner professes to see these lawsuits as part of a campaign to intimidate and coerce users into accepting ASCAP licenses. We suggest that it would be more appropriate to view these suits as an effort to put an end to many years of piracy of musical works of respondents and others and to redress the rights granted by Congress pursuant to the coypright clause of the Constitution.

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*After the judgments below were entered, petitioner executed and tendered to ASCAP a retroactive license agreement covering the period January 1, 1959 to December 31, 1963 and extension agreements for 1964-1967. ASCAP has executed the tendered agreements and petitioner has paid license fees under the agreements.

ARGUMENT

The decision of the Court of Appeals was clearly correct. Moreover, it neither involved nor turned on any significant question of federal law that should be decided by this Court. Petitioner has failed to show any special and important reason for granting its petition for a writ of certiorari to review the decision below.

The Options Available to Petitioner

We submit that the single most important fact in this case is this: by virtue of the 1959 Washington rate proceeding, at any time after November 20, 1959, petitioner could have obtained a license from ASCAP to perform publicly for profit any musical composition in ASCAP's repertory, subject only to its obligation to pay a license fee which Chief Judge Ryan had determined to be reasonable, with the approval of petitioner's present counsel.

As the Court of Appeals noted, petitioner had five options available to it, four of which were lawful:

Petitioner could have obtained a blanket license and along with it the right to play as much or as little, as frequently or as rarely, any of the compositions in the ASCAP repertory. Or petitioner could have obtained a per program license which would have required it to pay a license fee only for those programs in which petitioner broadcast music from the ASCAP repertory.

And, if the foregoing alternatives were unacceptable to petitioner, it could have undertaken to deal with ASCAP members directly.

Or petitioner could have refrained from giving public performances for profit of music in the ASCAP repertory.

Instead, petitioner chose the fifth—the unlawful—alternative. Petitioner never obtained any license. It never sought to deal with anyone. It continued its unconscionable conduct in appropriating respondents' property without cause and without justification.

"Price Fixing" and "Block Booking"

Petitioner's affirmative defenses based on federal law are without merit. Respondents have not unlawfully extended their copyright monopolies nor are they guilty of violating the antitrust laws in any other respect.

Petitioner uses almost all the epithets know to the federal antitrust law—"price fixing," "block booking," "tying agreements," etc. But the hard facts are:

ASCAP has no power to fix license fees. Every would-be user of ASCAP's repertory has an absolute right either to obtain a license from the Society at a reasonable and non-discriminatory rate or he may deal directly with any individual member for a license on any mutually agreeable basis.

We can go further:

On the record before this Court, it is plain that ASCAP has not violated any antitrust law but has, in fact, established a classically free market in musical compositions. Buyers and sellers of the right to perform musical compositions are guaranteed free access to each other, and if their bargaining does not produce agreement on a fair price, a judge is standing by to adjudicate the matter.

On the supply side, any composer, author or publisher is insured ready access to the market where songs are licensed: ASCAP admits to membership anyone who meets certain minimal standards.

On the demand side, every user of music has an absolute right to obtain a license to the entire ASCAP repertory on non-discriminatory terms. He can not be excluded from the market by virtue of anyone's control of all or any part of it (and the right of a user to deal with individual copyright proprietors is preserved by the Amended Final Judgment's bar against ASCAP's interference in such dealings).

Finally, the burden of establishing reasonableness of rates is on the supplier.

Petitioner purports to see in ASCAP's blanket and per program licenses something akin to tie-in sales (where a seller refuses to sell Item A unless Item B is purchased simultaneously) or to "block booking" (a form of tie-in once employed in the motion picture industry, whereby an exhibitor could not obtain licenses to films separately, but was forced to obtain a license for a whole group of films); see *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *United States* v. *Loew's Inc.*, 371 U. S. 38 (1962). The evil in these practices is that the buyer is compelled to buy what he does not want in order to obtain what he does want.

But ASCAP imposes no such compulsion. True, it does offer licenses to its entire repertory—in effect offering a licensee a library card to use whatever he wishes, whether in existence at the time of the agreement or composed subsequently during the term of the agreement. And broadcasters regularly seek such licenses because of the convenience they offer. But a broadcaster is absolutely free to deal with the individual copyright proprietor if he wishes a license for individual songs. The broadcaster is not faced with an all-or-nothing proposal which raises antitrust objections to block booking and other forms of tie-ins.

Petitioner purports to find antitrust violations in the fact that the Amended Final Judgment empowers the District Court to determine a reasonable license fee. In petitioner's view, the antitrust laws outlaw judicial determination of a reasonable price.

Petitioner cites no authority for its novel view. We respectfully submit there is none.

Alden-Rochelle and Witmark

Although petitioner has no facts to support its contentions, it has sought to find the applicable law in *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S. D. N. Y. 1948), and *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn. 1948).* Both cases involved ASCAP's relations with motion picture exhibitors 20 years ago—*prior to the 1950 Amended Final Judgment.*

As the Court of Appeals for the Second Circuit pointed out in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 331 F. 2d 117, 121 (2d Cir. 1964), *cert. denied,* 377 U. S. 997 (1964):

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and had no provision for

*Petitioner's reliance on the opinion of the Superior Court of the State of Washington, Yakima County, in *Cascade Broadcasting Co.* v. *ASCAP,* No. 45877, is also misplaced. To the extent that the Washington Superior Court's opinion purports to deal with questions of federal antitrust law, it is entitled to little, if any, weight. Moreover, under Washington law it is entitled to no weight at all. No final order or judgment has been entered in the *Cascade* lawsuit and under Washington law an opinion by a court, prior to a final ruling, has no binding effect. *Ferree* v. *Doric Co.,* 62 Wn. 2d 561, 383 P. 2d 900 (1963).

judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S. D. N. Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)."

In recognition of the changes thus wrought in 1950, we may note, Judge Leibell vacated the injunctive order which he had entered in *Alden-Rochelle*.

In consequence, *Alden-Rochelle* and *Witmark* are of only historical interest today. Neither is of any pertinence here.

Performance Licenses for Recording Companies

In its eager hunt for a reason to avoid paying for its infringements, petitioner advances one last theory: the Amended Final Judgment should be amended to require ASCAP and its members to license performing rights to record companies along with recording rights. Radio stations would then obtain the right to perform a copyrighted work by playing a recording of it whenever they acquired the recording either by purchase or gratis from a record company. Under this scheme, broadcasters could avoid having to obtain performance rights for their own performances because record companies would obtain the necessary rights for them.

We may note that, in the courts below, petitioner contended that ASCAP and its members had entered into a "conspiracy" to refuse to issue licenses to recording companies for public performance of recorded musical compositions on broadcasting stations. Petitioner has now abandoned its "conspiracy" theory—and for good reason. Not one single piece of evidence was ever adduced to support it.

There is no tacit understanding among ASCAP's members not to license performing rights to record companies. ASCAP and each member of ASCAP have the unfettered right to license performing rights to record companies. It is stipulated also that no record company has ever asked for such a license (R. 30, Facts 63, 64, 65, 66). Judge Solomon thus summarized and found the facts (R. 37, Fact 75):

> "There is no evidence that plaintiffs or other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing broadcasting stations to perform publicly for profit any musical composition."

Evidently, record companies are just not interested in going into the business of obtaining performance rights. And, we might suggest, for good reason. Record companies make money by selling records to the public for home consumption. The records which they sell or give to radio stations are but a tiny fraction of their business. Consequently, it makes no sense for a record company to obtain a performing rights license for thousands of broadcasters. The record company—which stands to gain little or no profit from sales to radio stations—has no reason to assume the broadcaster's responsibility of arriving at mutually agreeable terms with the owners or licensors of performing rights.

We may note here the provisions of the Copyright Law dealing with royalty payments for recording rights. 17 U. S. C. § 1 provides in pertinent part:

> ". . . whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on such

> part manufactured, to be paid by the manufacturer thereof . . .;"

17 U. S. C. § 1 goes on to provide that payment of this royalty for the right to record

> "shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit."

Thus, the Copyright Law itself contemplates separation of the right to record from the right to give public performances for profit and points clearly to the reasons why recording companies are not interested in performance rights.

CONCLUSION

This case presents issues that are not of general public importance warranting the consideration of this Court. The decisions of the Court of Appeals and the District Court were correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 7, 1967

Appendix A

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants.*	Civil Action No. 13-95 AMENDED FINAL JUDGMENT

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

NOW, THEREFORE, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect

of any such issue and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

I. This Court had jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II. As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

(E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or

enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

III. The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compostions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public per-

formance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee

of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

V. Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:

(A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis

for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user

and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of

dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the

various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and

the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ACSAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

X. No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest

in such licensee or prospective licensee, or in any subsidiary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI. Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

XII. Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintaining or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

Appendix A

XIII. In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members

of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

XIV. Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

XV. Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

XVI. For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives

of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

XVII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time

after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V (C) hereof). During the applicable periods specified above, defendant ASCAP is hereby ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

VIII. This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved:

March 14, 1950

HENRY W. GODDARD
United States District Judge

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

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Judgment entered:

WILLIAM V. CONNELL
Clerk
March 14, 1950

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 147

K–91, INC., PETITIONER

v.

GERSHWIN PUBLISHING CORPORATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 9, 1967, this Court invited the Solicitor General to express the views of the United States on this case. This memorandum is filed in response to that request.

STATEMENT

This is an action for infringement of the copyrights on some 183 recorded musical compositions (F6).[1] Respondents, the owners of the copyrights, sued petitioner, a corporation operating radio station KIXI in Seattle, Washington. In 1961 and 1962, that station gave public performances for profit of the compositions by broadcasting recordings of them without pay-

[1] "F" refers to the Findings of Fact made by the District Court.

ing any royalties and without the owners' consent (F2, 3, 4, 6, 7).[2] Some of the defendant radio stations have been engaged in such a practice for at least 10 years (F8).

Petitioner admitted the infringement of the copyrights, but defended on the ground that respondents could not maintain their suit because, as members of the American Society of Composers, Authors and Publishers ("ASCAP") they had formed an unlawful conspiracy in violation of the antitrust laws[3] which was engaged in price-fixing and block-booking of its members' works (Pet. App. 5, 13). It counterclaimed, seeking treble damages and an injunction against further renewal of the copyright (Pet. App. 14).

ASCAP is an unincorporated membership association of some 8,000 authors, composers, and publishers who own copyrights in various separate musical compositions (F16). It licenses these works for nondramatic public performances (F18). ASCAP's musical repertory, which is constantly changing as new copyrights are added and old copyrights expire (F23), includes more than one million works (Pet. App. 6).

Each respondent in the instant case has granted ASCAP the non-exclusive right to license its works

[2] Suits were also filed against two other Washington corporations operating radio stations and an individual officer of one of them. However, these defendants did not appeal from the district court's adverse ruling.

[3] Petitioner also asserted that respondents had violated laws of the State of Washington governing copyright protection (Chapter 19.24 R.C.W.), and were barred from relief by the "unclean hands" doctrine because they had unlawfully extended their individual copyright monopoly. Neither of those issues is presented in the petition for certiorari.

for non-dramatic public performances for profit (F21). This licensing activity is regulated and controlled by a consent decree entered in *United States* v. *ASCAP*, S.D.N.Y., Civ. No. 13–95 [4] (Br. in Opp. App. 1a–17a). As pertinent here, the decree requires ASCAP to "grant any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Par. VI). However, the decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the composer cannot be located within 30 days (Par. VI). Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." ASCAP must avoid discrimination in fees (Par. VIII), and must offer comparable fees to all applicants similarly situated (Par. IX(C)). If the parties are unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply [to the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Par. IX). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (Par. IX).

In addition, the 1950 consent decree forbids ASCAP from charging license fees for commercial programs which are based upon a percentage of

[4] CCH Trade Cases, 1950–1951, ¶ 62,595.

income from programs not including ASCAP compositions, unless the broadcaster desires such a license (Par. VII(A)). It also requires ASCAP to offer per program licenses for commercial programs for a flat fee or for a percentage of revenue from the program in which ASCAP music is played (Par. VII(B)). ASCAP must offer "a genuine economic choice between per program and blanket licenses" to stations with relatively few commercial announcements, and is restrained from influencing the licensee to negotiate for blanket licenses prior to negotiating a per program license (Par. VII (B) and (C)).

For radio stations located in the State of Washington a special arrangement under the decree was established in a consent order.[5] The order provides for two types of licenses: A blanket radio license and a per program radio license. Both licenses grant the licensee the right to perform any composition in the ASCAP repertory. The blanket license fee is 2.125 percent of the licensee's overall revenues from sale of time on the air, after certain deductions. The per program license fee is 8 percent of the gross revenues derived from the particular programs in which ASCAP compositions are performed (F38–45; Pet. 8).

Petitioner has never applied for either form of license; nor has it ever sought any other kind of license (F48). Since ASCAP's licenses are non-exclusive, respondents also have the right individually to

[5] This order resulted from differences between ASCAP and certain Washington broadcasters concerning the effect of a Washington State statute, R.C.W. 19.2., which makes it unlawful for combinations of copyright holders to issue licenses in the State of Washington for the right of public performance of their copyrighted works, except on a per piece basis (see Br. in Opp. 11–15; F38–45).

license their works on any basis, per piece or otherwise, which is mutually agreeable to applicants and themselves. Petitioner has never attempted to obtain such a license (F50–51).

The parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition (R. 30, Agreed Fact 50). And the district court found that a central licensing agency such as ASCAP is the only practical way that copyright proprietors may enjoy their rights under the federal copyright laws and that broadcasters and others may conveniently obtain licenses for the performance of copyrighted music (F25). It found that single copyright owners cannot deal individually with all users or individually police the use of their songs (F25); and that a single radio station may broadcast as many as 60,000 performances of recorded musical compositions per year involving as many as 6,000 separate compositions (F11–12).

The district court concluded that the defendant radio stations had infringed the respondents' copyrights and that petitioner's defenses and counterclaims under the antitrust laws were without merit (Conclusions of Law 2, 15).[6] On appeal by petitioner, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. 26, 27). The court held that no issue was presented as to whether the decree immunized ASCAP from further prosecution for violation of the antitrust laws. It determined, however, that ASCAP

[6] Petitioners and ASCAP have entered into a retroactive license agreement which as extended runs from January 1, 1959, to December 31, 1967 (Br. in Opp. 15).

was not a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. Noting that when an applicant claims that ASCAP's fee is unreasonable, the court which entered the consent decree can be asked to fix the fee, the Ninth Circuit concluded that ASCAP cannot fix prices because "so long as ASCAP complies with the decree, it is not the price fixing authority," and indicated its disagreement with the view "that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree" (Pet. App. 18). In addition, the court concluded that because ASCAP's licensing authority is not exclusive and prospective licensees may therefore seek individual arrangements with individual composers, the activities disclosed by the record did not violate the antitrust laws (Pet. App. 19).

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they

wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Court would not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17–18). To the extent that ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works raise difficult problems under the antitrust laws. See, *e.g., Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.,* 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the

relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting.

The sale of the right publicly to perform for profit a copyrighted musical work, through the playing of a record of the composition, is not wholly comparable to the sale of a manufactured product or the sale of a license to make, use or vend a patented product. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, with *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191, 197. Broadcast of a recorded song over the radio is an intangible, audible event of a few minutes' duration. The resulting public "performance" for profit is not an alienable object like a copyrighted film or the phonograph record itself. The "performance" cannot be owned or transferred; it occurs only while the recording is being played over the air. Each playing is a separate performance subject to the copyright holders' control over performing rights. Congress has made that right wholly separate from the right to reproduce and sell recordings of the copyrighted work (17 U.S.C. 1(e)).

The exclusive right to make (*i.e.,* copy) and vend copyrighted works is analogous to the right to make and vend patented products, and the same antitrust considerations have been applied to abuses of these exclusive rights as are applied to patent rights. *United States* v. *Loew's Inc.,* 371 U.S. 38; *United States* v. *Paramount Pictures,* 334 U.S. 131. However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded

music are, for obvious practical reasons, subject to somewhat different considerations.

The market for the evanescent right to broadcast a piece of recorded music is completely unlike the market for the right to perform the music in a commercial film's sound-track. Cf. *Alden-Rochelle, supra,* and *Witmark, supra.* Recordings are available everywhere to everyone, without distinction between home and commercial users, and the copyright holders have no voice in their sale. Once the holder has agreed to a recording of his work, it may be recorded by any company upon the giving of appropriate notice subject to the payment of the royalty of two cents per record (17 U.S.C. 1(e)). There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann. Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the

mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their

[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be nonexclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures,* 334 U.S. 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest

[8] Broadcasters with special needs may find it feasible to deal directly with publishers.

that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

Alternatively, petitioner argues that its objections might be avoided if ASCAP were required to negotiate licenses with recording companies so that the performance rights would be sold at the source, *i.e.*, anyone acquiring ownership of the record would also own the right to perform it publicly for profit.[9] But there is nothing in the record to indicate that recording companies have ever sought such rights, that they have any economic incentive to do so, or that ASCAP has ever attempted to prevent them from obtaining such licenses. The reasons for this readily suggest themselves. Such companies earn their income from the sale of recordings, not from the public performance of the recording for profit. Moreover, the value of the performing right for a single song

[9] Such an arrangement has been adopted under the ASCAP decree with respect to the performance of music incorporated into the sound track of motion pictures distributed to movie exhibitors. Prior to 1948 ASCAP required exhibitors to obtain a license from it in order to play the music on the sound track of films they had rented. The 1950 amendment to the decree forbade this, thus requiring ASCAP to negotiate with the motion picture producers a license for public performance of the music which would operate to the benefit of anyone renting the film. See Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 Law & Contemp. Prob. 294 (1954).

cannot be determined until it has been exposed to the public and the extent of demand for its playing can be assessed. Finally, since the same record may be used at home or in the broadcast studio, the price of the performing right would be reflected in the price of the record sold to the general public, thus requiring the record-buying public to subsidize the operating costs of radio stations which broadcast the musical compositions.

If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra*, p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under

the Sherman Act in 1941 and obtained a consent decree against it. As conditions change[10] or abuses are disclosed, it may become necessary, as in 1950 (see, pp. 3–4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

Private parties, of course, always have the option of seeking relief in their own behalf, nothwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result."[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted:

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DECEMBER 1967.

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[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

[11] What we say here applies only to the record in this case. Other ASCAP licensing activities are not involved and we take no position concerning them.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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IN THE

Supreme Court of the United States

October Term, 1967
No. 147

K-91, INC.,
Petitioner,

v.

GERSHWIN PUBLISHING CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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Concerned about the questions raised in the petition, the court on October 9, 1967 requested the government to express its views. Complying with the court's request, the Solicitor General on December 12, 1967, filed a memorandum as *amicus curiae* and the clerk of the court accorded the parties an opportunity to comment. These are the petitioner's comments.

DISCUSSION

1. The Government's Failure to Respond to the Court's Request

In seeking the government's views the court did not want only an opinion of whether or not the result below

was correct. The court sought the government's views on whether the questions presented by the petition merit the court's attention and whether the reasons given in the petition justify granting the writ. Without conceding that the lower decision is correct, the petitioner submits that the court often hears cases in order to answer important and perplexing questions of national concern and to resolve inconsistencies among the lower courts. The government ignored these considerations and failed to address itself to the questions raised in the petition.

The petitioner will not re-argue the reasons the court should hear this case but stands on its petition and the authorities cited therein and respectfully invites the court's re-examination of the petition. The writer, however, feels compelled in fulfilling his responsibility to the court and to his client to respond to the government's assertions.

2. The Government Concedes There Are Violations of the Antitrust Laws

Instead of arguing that copyright holders are not violating the antitrust laws, the government concedes the violations, but asserts that there are reasons for excusing them. These reasons are: (1) Combining copyrights and collective licensing are the only practical ways to market copyrights. (2) The petitioner has the burden of proving better alternatives and the petitioner has failed to do so. (3) Business difficulties justify collective activity. (4) Copyrights are different from other intangibles and require special protections. (5) Clearance at the source will not work in the broadcasting industry.

In conceding violations and then excusing them, the

government fails to answer the questions raised in the petition or to challenge the reasons why the court should hear this case. Summarizing, the government left unanswered these questions: (1) Should prices be fixed in the courts instead of in the free market? (2) Is illegal block booking purged by offering impractical methods of individual licensing? (3) Can a consent decree immunize against violations of the antitrust laws? (4) Does the *per se* rule apply to copyrights? (5) Should copyright owners be permitted to extend their individual copyright monopolies into larger monopolies? (6) Should the conflicting opinions in the lower courts be resolved?

3. Petitioner's Response to the Government's Assertions

Assertion No. 1. Combining copyrights and collective licensing are the only practical ways to market music.

This assertion means that the government places a higher value on the rights of copyright holders than it places on the rights of broadcasters and the public. The government's position is that music users must give ground to the marketing demands of copyright owners. Consequently, the music-using public must shoulder the burden of establishing feasible alternatives to marketing music (Govt. Mem. 13). Until then, music combinations and illegal bulk licensing arrangements must be condoned and sanctioned. Most astounding, the government postulates that free competition must retreat from the demands of business convenience and expedience (Govt. Mem. 8, 9, 13).

To vindicate these conclusions, the government makes

some startling statements. Statements which find no legal substantiation. Strong statements which are subjective and cannot be supported by case or statutory authority: "There is simply no escaping, as a practical matter, the licensing of the works in bulk." (Govt. Mem. 11). Again, "It would appear, therefore, that there must be some form of centralized licensing system . . ." (Govt. Mem. 9-10). "However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded music are, for obvious practical reasons, subject to somewhat different considerations" (U.S. Mem. 8-9). Clearly the government has determined that the rights of the music-using public are inferior to the rights of copyright owners and therefore less worthy of protection.

Assertion No. 2. The petitioner has the burden of proving alternatives and the petitioner has failed to do so.

To compound the difficulty, the government requires the petitioner to first demonstrate and prove to the government's satisfaction that combined pricing and bulk licensing are inferior to alternatives found in the free market. This is unheard of in antitrust law and equity. In other words, the wrongdoer has a favoring presumption that his combined method of operation is legal so long as he establishes some practical excuse for his conduct. That excuse may be as meager as encountering business difficulties in operating in a free market. The burden then, shifts upon the public, in this case the broadcasters, to furnish a "substantial basis for concluding that practical alternatives exist . . ." (Govt. Mem. 13). The music user must then come forward with evidence demonstrating a

reasonable possibility that alternative methods are feasible" (U.S. Mem. 13). This hypothesis of relative burdens of proof and priority of evidence is unheard of in antitrust law procedure and manifestly unfair and inequitable to those who seek the protection of the Sherman Act.

After ostensibly asking for alternatives to bulk licensing and price fixing, the government subjectively and arbitrarily stamped those shown by the petitioner in the record and suggested in conferences as impractical.[1] (Govt. Mem. 9). The enormity of the burden to be overcome by any would-be private litigant in this field is unwarranted and almost unsurmountable.

Let us compare the alternatives the government offers broadcasters. Is it practical for a small radio station operator located three thousand miles distant to petition a federal court in New York city for redress? The "right" to petition for reasonable rates (if a percentage of gross income can ever be reasonable) is worthless to the vast majority of broadcaters and other small music users such as restaurants and skating rinks. The government is out of touch with reality. In truth and in fact the consent decree is impractical to use. It perpetuates monopoly and economic imbalance to the detriment of those it is purportedly designed to protect. The right to petition looks

1. During the trial several broadcasters testified that a master list of all copyrighted music offered by ASCAP or copyright holders could be made available with a price on each. Then broadcasters could easily select those priced according to value and worth to the user. Another alternative suggested by uncontroverted testimony was that clearance at the source on records would be feasible. (See testimony reprinted from the Transcript in Appellant's Brief, R. 36, App. Br., Appdx. 35-45, testimony of Rogan Jones, KGMI; Lincoln v. Miller, KIRO-TV; James W. Wallace, KPQ; Lee Facto, KGMI.)

good on paper, but in actuality it is an empty gesture and so impractical it is no right at all.

Speaking of practical alternatives and realities, these are incontrovertible realities, but the government has ignored or lost sight of them. ASCAP controls a vast pool of over one million copyrights—the bulk of all the copyrighted music in the world. Each single piece of music is arbitrarily assigned one price and one price only. Even the courts recognize this (See Pet. 14-15). All one million pieces of music are arbitrarily priced the same whether the music is a valuable favorite like "White Christmas" or a worthless has-been like "Three Little Fishes." Since 1913 this combination has controlled the marketing of music. In the past half century new industries have arisen—radio, television, motion pictures, tapes, commercial movies, community antenna television, background music, FM radio, stereo broadcasting, etc. Yet each of these music-using industries has been forced to obtain its music from ASCAP's pool and never has there been an opportunity to develop new and different methods of marketing music to fit changing needs. There never will be so long as ASCAP remains in control of the market. How can alternatives develop or be conceived when there never has been a free market in which to test them?

The thrust of the matter is for fifty years the government has turned its back on conceded antitrust violations and the needs of the public.

Assertion No. 3. Business difficulties justify collective activities.

To this assertion the petitioner needs only to cite the authorities. "The law does not allow an enterprise that

maintains control of a market through practices not economically inevitable, to justify that control because of its supposed social advantage. It is for Congress, not for private interests, to determine whether a monopoly, not compelled by circumstances, is advantageous." *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295, 345 (D. Mass. 1953). Aff'd, 347 U.S. 521 (1954).

"If good business reasons and expressions of good intent would serve as a defense for restraining trade, the Sherman Act would be rendered impotent." . . . *Hazeltine Research Inc. v. Zenith Radio Corp.*, 239 F.Supp. 51, 78 (N.D. Ill., 1965). The government cannot justify combining the individual monopolies of copyrights by arguing the necessities and convenience of such a policy. The Supreme Court has never permitted making the difference between legal and illegal conduct hinges upon an "elaborate inquiry as to the precise harm they have caused or the business excuse." . . . *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

Business excuse is a problem for copyright holders to overcome and not a problem for music users or the petitioner to overcome. Congress wrote no exemption in the Sherman Act for copyright holders and "it is for Congress to decide on what conditions, and subject to what regulations, such a monopoly shall conduct its business." *United States v. United Shoe Mach. Corp.* 110 F.Supp. at 345. For additional argument on citation of additional authorities see App. Br. 62-64.

Assertion No. 4. Copyrights are different from other intangibles and require special protection.

The government attempts to justify its conclusion that copyright owners deserve "tolerance" because music rec-

ords are not wholly comparable to other manufactured products and performance rights are different from other incorporeal rights such as patents (Govt. Mem. 8-10). This contention is indeed strained. It is strained more by the assertion that copyrights are in a "unique market" (Govt. Mem. 10).

One of the easiest ways out of a difficult problem is to argue the problem is different. The courts have never recognized differences between copyrights and patents within the context of the antitrust laws. *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Morton Salt v. Suppiger*, 314 U.S. 488 (1942); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. 51 (1965); *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). There is no difference between the market to perform music on records and the market to perform music on films (Govt. Mem. 9). Both films and records contain sounds recorded on mechanical devices. Much music is recorded on tapes rather than discs. A picture film is a tape with the added photographic image. Considering marketing problems, there are more theaters than radio stations in this nation. Thus, there are no more effective means to account for performance of music on films than on records.[2] Just as with records, the copyright act provides that once a holder has agreed to a recording of his work, it may be re-

2. Petitioner does not object to copyright holders combining in order to more economically and effectively police for infringements, but it does object to combining for illegal purposes such as bulk licensing and fixing prices.

corded on film by any company upon giving of appropriate notice subject to payment of two cents royalty. 17 U.S.C. 101. The similarities between patent rights and copyrights and performance rights on films and recorded tapes or discs far surpass the differences. Whether one is considering mechanics or markets, the government's contention that performance rights are "different" is strained to say the least.

Assertion No. 6. Clearance at the source will not work in the broadcasting industry.

In 1950 the government amended the ASCAP consent decree to require ASCAP to issue motion picture producers a single license covering copyrighted music on films without requiring further licenses by theaters showing the films (D. Ex. A-2, §V(c), See Govt. Mem. 12 footnote 9). Yet the government neglected to give this protection to television stations which show the very same films. ASCAP is prohibited by the decree from licensing or suing theater exhibitors for infringement of performance rights (D. Ex. A-2, §IV (E) (F)). This protection is not afforded television or radio stations. The government must be criticized for protecting the interests of the motion picture industry by prohibiting combination, rate fixing or block booking, and neglecting the broadcasting industry which uses the very same products in the same market. Certainly radio and television stations compete with theatres for the attention of the public, yet broadcasters pay fees to ASCAP, are sued and have no clearance at the source. Furthermore, broadcasters are required under the decree to accept industry-wide licenses and negotiate on an industry-wide basis. For the picture

industry the decree, however, requires licensing on a "per film" basis and not on an industry-wide basis (Def. Ex. A-2, §V (B) (2) (3)).

As can be seen the decree actually takes ASCAP out of the motion picture industry and prohibits copyright holders from combining to license this industry collectively. This same method of licensing at the source would work in the broadcasting industry (see petitioner's explanation of how it would work, Pet. 20-21).

The government, however, contends that recording companies have no economic incentive to seek performance rights while motion picture producers do (Govt. Mem. 12). Until the decree was amended in 1950 requiring licenses to be issued to producers, no producers asked for licenses. But when the courts forced the government to amend the decree, then and only then did licensing at the source have a chance to work. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F.Supp. 843 (D. Minn. 1948).

So long as ASCAP controls the market for performance rights, it can continue to force broadcasters and other music users to purchase the rights. Recording companies have no incentive to offer broadcasters performance rights as an inducement to purchase and play their records. Before the *Alden-Rochelle* and *Witmark* cases picture producers, like recording companies, had no economic incentive to seek performance rights. Once ASCAP lost its control over the market and could no longer force exhibitors to take performance licenses, the producers of pictures in order to induce exhibitors to show their films

had to acquire the performance rights and in turn offer them to the exhibitors. As stated in the petition, the same result would follow in the recording industry if this court would require ASCAP to treat the broadcasting industry as it treats the motion picture industry (Pet. 20-21). The record shows if broadcasters have a choice between purchasing and playing records which are cleared and those which are not, they would obviously only play cleared records (see testimony reproduced in App. Br. p. 36, Appx. 35-45). The rights of the public and copyright owners could easily be protected by simply printing on the tape or record label a statement that the performance rights are cleared for commercial use or not cleared. This suggestion was made to the government, but the government's staff brushed it aside with the cavalier remark that it would not work, notwithstanding that it is presently being done in Europe today.[3]

CONCLUSION

The petitioner regrets to say that it questions the value of the government's views. Howard E. Shapiro and Daniel Friedman, attorneys in the Department of Justice, told the petitioner's counsel, Ronald A. Murphy, that the antitrust division had no choice but to support its own decree. Furthermore, the Solicitor General was very inclined to follow the recommendation of the antitrust division in presenting its views to the court. The petitioner wonders how under these inexorable circumstances the government could reach any different conclusion than to urge the court to deny the writ.

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3. Schemel and Krasilovsky, *The Business of Music*, First Ed. p. 22 (1964).

The government's views are based upon excuses. The government did not answer the questions raised in the petition. Instead, the government avoided them by urging that central licensing is the only practical way music can be marketed. Why? Because this is the thrust of the consent decree which has been fostered by the government for over twenty-seven years. The government is loath to admit that its decree has not been effective to protect the public and that the public has suffered unnecessarily for so many years. Most hopefully this court will see fit to make the government change a decree that is not working for the benefit of the public, but is instead protecting wrongdoers under the guise of necessity.

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